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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK WILLIAMS, ROBERT H. CRIST and D. EUGENE THORNE, *Petitioners*,

v.

TIMOTHY MILONAS, JR. AND KENNETH RICE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. May a federal court enjoin, under the Federal Civil Rights Act, therapeutic treatment procedures of a private institution where those procedures are not regulated, coerced or even encouraged by any state agency?

2. Does a private instiution become a "state actor" for all purposes under the Fourteenth Amendment and 42 U.S.C. § 1983 simply because it has some contracts with state agencies or is subject to limited state regulation in areas unrelated to the practices challenged?

3. May the federal courts substitute their judgment of what are "necessary" or "appropriate" treatment procedures for the judgment of concerned parents who, with the advice and recommendations of qualified professionals, have selected and consented to private therapeutic treatment procedures for their children?

4. Is it unconstitutional for parents, with the advice and recommendations of qualified professionals, to subject their minor child to a therapeutic treatment program which includes, under some circumstances, (1) utilizing a polygraph; (2) monitoring and restricting mail; (3) utilizing "time-out" rooms; and (4) utilizing some physical restraint when necessary?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Defendants Jack L. Williams, Dr. Robert H. Crist and D. Eugene Thorne petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals(App. A, *infra*, 1a-28a) is reported at 691 F.2d 931 (10th Cir. 1982). The memorandum opinion of the District Court for the District of Utah (App. B, *infra*, 33a-102a) is not reported.

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*All parties appearing before the Tenth Circuit are named in the caption. Plaintiffs Milonas and Rice, through their attorney and guardian ad litem, appeared on behalf of themselves and as representatives of a class of all students at Provo Canyon School, past, present and future.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 13, 1982. On November 9, 1982 that court denied petitioners' timely motion for rehearing with suggestion for rehearing en banc. (App C, *infra*, 103a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. § 1983 provides in pertinent part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

STATEMENT

This suit was brought by the American Civil Liberties Union in September, 1978, in the names of two former students of the Provo Canyon School. It is an individual action for damages and a class action for injunctive relief under 42 U.S.C. § 1983. Plaintiffs sought compensatory damages and one million dollars in punitive damages. They also sought an order closing Provo Canyon School, or alternatively, an injunction prohibiting thirteen allegedly unconstitutional treatment procedures.[1]

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[1] In October, 1979, plaintiffs' counsel also filed an identical companion case, *Horton, et al. v. Williams, et al.*, Civil No.

Defendants Jack L. Williams, Dr. Robert H. Crist, and Dr. D. Eugene Thorne are the owners and administrators of the Provo Canyon School.

This case was tried to a jury for nineteen trial days days in March, 1980. The jury returned a unanimous verdict in favor of the defendants on every issue. Nevertheless, the district court, having reserved the class action claims for injunctive relief, concluded that the School's administrators were state actors by virtue of a symbiotic relationship with the state. The district court then enjoined four of the procedures utilized in the School's therapeutic program: the use of polygraph tests; the monitoring of student mail; the use of "time-out" rooms; and the use of physical restraint except under specified circumstances. (App. B, *infra*, 31a-32a.) The district court found plaintiffs to be the "prevailing parties" under 42 U.S.C. § 1988 and awarded them costs, including attorneys' fees of $133,546.00.[2]

On appeal the Tenth Circuit affirmed the decision of the district court.

Provo Canyon School is a privately owned and operated facility,[3] established for the treatment *and* edu-

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C-79-0723J, seeking compensatory and punitive damages on behalf of additional named plaintiffs individually and as representatives of a class of all past, present or future students of Provo Canyon School. *Horton* has been stayed by the district court pending a final determination of the present case.

[2] This amount has now grown to approximately $200,000.00. *See* Section "*B*" and n. 8, *infra*.

[3] The School is a private corporation owned solely by defendants Jack L. Williams, Dr. Robert H. Crist and Dr. D. Eugene Thorne. The physical facilities are owned by a partnership comprised of these same three individuals.

cation of adolescent boys with problems so severe as to require a structured, therapeutic environment. All of the boys enrolled in the School suffer serious emotional or behavorial disorders (App A, *infra*, 6a), often coupled with educational disorders or learning disabilities. Many of the boys have engaged in criminal behavior. The School's professionally-developed therapeutic treatment program applies a system of rewards or punishments, based upon a student's behavior, and has been highly successful in most cases.

A majority of the boys enrolled in Provo Canyon School are placed there by their parents. (App. A, *infra*, 7a). Some are placed pursuant to written contract by or through juvenile courts, probation departments and school districts which have determined in each individual case that the boy cannot function in a less restrictive environment or that the programs at Provo Canyon School have a reasonable probability of elevating a boy's educational level and treating his behavioral disorders. The School's procedures are fully disclosed and explained to parents or guardians and no boy is admitted unless the parent or guardian consents to the use of those procedures. (App. B, *infra*, 73a.)

A full accounting of all sources of funding to Provo Canyon School over the years 1973-1979 reveals an average of less than 23% coming from contracts with government-related entities. (*See* App. A, *infra*, 5a-6a n.4.) And notwithstanding the receipt of some tuition and other payments from federal and state agencies or school districts, it is undisputed that *no governmental agency or employee participated in any way in the formation of the challenged treatment procedures.*

The School's educational program is subject to a variety of federal and state regulations under the Education for All Handicapped Children Act, 20 U.S.C.

§ 1401, *et seq.* (1976). Again, however, no state regulations control or even affect the School's therapeutic program, including the challenged treatment procedures. In fact, the district court repeatedly expressed concern with the *failure* of the state to regulate or monitor the School's therapeutic program. (*See* App. B, *infra*, 65a-66a.)

REASONS FOR GRANTING THE PETITION

In two recent cases, *Rendell-Baker v. Kohn*, 50 U.S. L.W. 4825 (U.S. June 25, 1982) and *Blum v. Yaretsky* 50 U.S.L.W. 4859 (U.S. June 25, 1982) (both of which were decided after the district court's opinion in this case) this Court reaffirmed the principle that acts of private parties generally may be considered to be "state action" for the purposes of the Fourteenth Amendment and 42 U.S.C. § 1983 only when there exists a clear and direct nexus between those acts and the state.

In this case, however, the court of appeals held that all actions of the private Provo Canyon School, even those entirely unrelated to any governmental regulation, were taken under color of state law. The court of appeals inappropriately distinguished its decision from *Rendell-Baker*, and failed altogether to apply *Blum v. Yaretsky*. The court of appeals' decision is squarely contrary to recent decisions of this Court and merits summary reversal.

The Tenth Circuit's decision has an extremely broad and detrimental impact on the private parent-child relationship, including the parents' "high duty to recognize symptoms of illness and to seek and follow medical advice." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). A majority of the boys at Provo Canyon School have been placed there by their parents after consultation with qualified, independent professionals. The tuition

of most boys enrolled at the School is paid totally by their parents. Nevertheless, under the decision of the court of appeals, the federal judiciary has allowed two adolescent named plaintiffs, having no personal stake in the outcome,[4] to dictate other boys' treatment programs. The court has substituted its judgment for that of parents and professionals based upon a finding that some governmental contracts, some governmental regulations, and some governmental funding, all unrelated to the enjoined practices and unrelated to those boys, justifies federal intervention into all activities of the school.

By holding that the enjoined practices violated constitutional rights of students at Provo Canyon School, the court of appeals affirmed a strained consitutional analysis by the district court which failed to accord any weight to the fact that the enjoined practices (1) were developed, administered and supported by medical professionals and other qualified experts, and (2) were consented to by the parents of all the boys placed in the School. Furthermore, the court of appeals' decision contradicts important recent decisions of this Court holding that due process may be satisfied by the exercise of reasoned professional judgment, and that decisions of parents, relative to the treatment and well-being of their children, are to be accorded great weight in considering any alleged constitutional deprivations. *Youngberg v. Romeo*, 50 U.S.L.W. 4681 (U.S. June 18, 1982); *Parham v. J. R., supra.*

The decision by the court of appeals, (1) approves the district court's substitution of its judgment for that of qualified, medical professionals and concerned par-

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[4] The two named plaintiffs, Milonas and Rice, demanded to be removed from the School the day this action was commenced. They were removed and have never returned to the School.

ents, and (2) identifies "new" constitutional rights. Its decision will substantially chill the appropriate exercise of such professional and parental judgment.

A. *The "State Action" Finding in the Present Case Conflicts With Recent Supreme Court Decisions.*

In this case the district court, affirmed by the court of appeals, found that "the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions." (App. A, *infra*, 16a.) The district court found this joint participation so complete as to give the color of state law to *all* actions of the Provo Canyon School.

This Court recently defined the standard for determining whether a private entity is subject to suit under Section 1983 as whether "the alleged infringement of federal rights [is] *'fairly attributable to the state'*," *Rendell-Baker*, 50 U.S.L.W. at 4828 (emphasis added). The Tenth Circuit acknowledged this principle (App. A, *infra*, 16a), but dismissed *Rendell-Baker* as inapplicable to its analysis in this case, and failed altogether to mention an important companion case, *Blum v. Yaretsky*, *supra*. In so doing, it avoided clear rulings by this Court that the conduct of private parties may be subject to the constraints of the Fourteenth Amendment as action taken "under the color of state law" *only* under very limited circumstances.

This Court in recent years has reaffirmed the fundamental principle announced nearly a century ago in the *Civil Rights Cases*, 109 U.S. 3 (1883), that private activity may not be deemed "state action" without a clear and *direct connection* between the state and the specific acts in issue. *E.g.*, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (there must be "a sufficiently close nexus *between the state and the challenged action* of the regulated entity so that the action of the latter may fairly be treated as that of the state itself" (emphasis added)).

Only a few cases have found broad state action without regard to the specific act complained of. Those few cases involve unique facts and are clearly exceptions to the general rule, and are not applicable here.

One such approach, articulated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and recognized but distinguished in *Jackson v. Metropolitan Edison Co., supra*, is the "intertwinement" test. Under this test the court looks to the existence of such *extensive* state regulation combined with the performance of a public service as to find a "symbiotic relationship" between the private entity and the state. In such cases "the state will be held responsible for conduct with which is had no direct connection." *Downes v. Sawtelle*, 574 F.2d 1, 8-9 (1st Cir.), cert. denied 439 U.S. 910 (1978). A second approach is the so-called "public function" or "delegation" doctrine, which is applied only when the state has delegated to a private entity a function so closely associated with the state, so "traditionally exclusively reserved to the State," *Jackson*, 419 U.S. at 352, that a private entity also assumes the state's constitutional obligations.

It is apparent from its decision in this case that the court of appeals failed to appreciate the distinction between the exceptional case and the generally required focus on the direct connection, if any, between the state and the specific activity challenged. Here, the lower courts' application of either the "intertwinement" or the delegated "public functions" tests was inappropriate and conflicts with standards articulated in this Court's decisions. The result of this broadened state action approach is to allow intervention by the federal judiciary into purely private relationships — a dangerously inappropriate result.

1. *"Public function."*

The district court ruled that defendants' actions were deemed to be actions of the state because Provo Canyon School performs the "public function" of education. (App. B, *infra*, 59a). The Tenth Circuit accepted this conclusion, holding that "the district court's finding that the defendants . . . were acting under color of state law . . . is in accord with applicable law." (App. A, *infra*, 16a.) The court of appeals misapplied the law in reaching this conclusion.

As this Court has stated, in order to attribute the acts of a private facility like Provo Canyon School to the state under the "public function" doctrine,

> the relevant question is not simply whether a private group is serving a public function. We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State."

Rendell-Baker, 50 U.S.L.W. at 4829, quoting *Jackson*, 419 U.S. at 353. This Court rejected the public function approach in *Rendell-Baker* because, even though "there can be no doubt that the education of maladjusted high school students is a public function," it is not *exclusively* so. Contrary to the statement by the court of appeals, the district court's finding in this case *does not* conform with that law. As the Second Circuit has observed, education "has never been a state monopoly in this country." *Powe v. Miles*, 407 F.2d 73, 79 (2nd Cir. 1968). *See also Jackson*, 419 U.S. at 354 n.9

2. *"Joint Participation."*

The Tenth Circuit's opinion stated further that "the State has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions," (App. A, *infra*, 16a, citing *Burton*, 365 U.S. at 715.) It pointed to four principal factors leading to this conclusion: (1) that many of the students at the School were placed at the School involuntarily by various state agencies; (2) that many school

districts placing boys at Provo Canyon School agreed to detailed contracts drawn up by the defendants; (3) that there was significant state funding of tuition; and (4) that there was extensive state regulation of the School's educational program. (App. A, *infra*, 16a.) Such factors simply do not disclose a degree of state involvement amounting to a *Burton-type* "insinuation". The court of appeals' conclusion that the state-school intertwinement justified attributing to the state conduct over which it had no actual control is directly contrary to *Rendell-Baker*.

The First Circuit's opinion in *Rendell-Baker v. Kohn*, 641 F.2d 14 (1st Cir. 1981), identified four factors "which have tended to weigh heavily" in analyzing the "intertwined" relationship requisite to state action under *Burton*: (1) use of public property; (2) public selection of private trustees to administer a state activity; (3) expression of intent by the state to treat a disputed entity as arms of the state; and (4) placement of a public institution in private hands with the actual purpose of evading constitutional requirements. *Rendell-Baker*, 641 F.2d at 23.[8] None of these four factors is present in this case.

Provo Canyon School is privately owned and operated upon private property by private administrators. The School does not contract with public agencies as to some of its individual students and is by reason of these contracts subject to regulations relating to its *educational* program. Nevertheless, such public con-

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[8] The *Rendell-Baker* decision involved a private school similar in character to Provo Canyon School, but dependent almost entirely upon state funding and subject to extensive state regulation. Despite the "considerable degree of cooperation between the state and the school," however, the First Circuit was not persuaded that it could "justify a finding that the challenged action occurred under color of state law." 641 F.2d at 23-24. This Court affirmed.

tracts are insufficient to support a finding of state action:

> Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Rendell-Baker, 50 U.S.L.W. at 4828.

Even where public contracts result in "extensive and detailed regulation," there is no state action unless the specific activity complained of is *compelled* by said regulations. *Id.* The practices enjoined herein were not compelled, or even encouraged, by any government regulation, yet the court of appeals did not even address this issue.

In *Rendell-Baker*, the combination of nearly total public funding, extensive state regulation and the educational nature of the services provided by New Perspectives School was not sufficient to establish a *Burton*-type symbiotic relationship or otherwise to convince this Court that the state should be held responsible for any of the school's activities over which it had exercised no direct power or control. The "intertwinement" test has very limited application. In instances such as this one — just as in *Rendell-Baker*—where the facts fall short of satisfying that test, the court may attribute private action to the state only if there is a "sufficiently close nexus between the State *and the challenged action*." Jackson, 419 U.S. at 351 (emphasis added).

3. *This Court's recent decision in* Rendell-Baker *and* Blum v. Yaretsky *require reversal herein.*

In view of this Court's direct treatment of the state action issue in *Rendell-Baker*, the Tenth Circuit's conclusion that *Rendell-Baker* "does not control the Section 1983 issue before us" (App. A, *infra*, 17a) is wrong. The standards and approach of *Rendell-Baker* cannot fairly be avoided; *Rendell-Baker* does control the issue.

In *Rendell-Baker*, this Court concluded that even though there was direct state involvement in many of the school's activities, there still was not such a pervasive relationship between New Perspectives School and the government that *all* of the school's actions could fairly be attributable to the state. The Court then considered whether the state could be held *directly* responsible for the challenged action. It concluded that the facts failed to establish the direct nexus necessary to find state action because the challenged conduct was not encouraged or coerced by the state.

The fact that the challenged actions in *Rendell-Baker* did not involve students — the "beneficiaries" of the state regulation — is the sole basis upon which the Tenth Circuit distinguished *Rendell-Baker*.[6] The court of appeals did not even address the undisputed critical fact in this case that the enjoined practices were not coerced or even encouraged by any state agency.

Just as in *Blum v. Yaretsky*, which found no state action in professional decisions which clearly did affect the beneficiaries of state regulation, *Rendell-Baker* focused on the challenged activity, not on the identity of the plaintiffs. Clearly, a challenged activity may affect the beneficiaries of *some* governmental regulation and yet still have insufficient connection with the state to be deemed state action.

The *Rendell-Baker* decision recognized that the New Perspectives School's role as an employer was separate from its role as an educator and that, although the school was subject to extensive state regulation in the area of education, the state had no direct regulatory

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[6] The court of appeals expanded upon an observation in the First Circuit's opinion that students *might* have a better chance of arguing state action than teachers did. This dictum does not justify the Tenth Circuit's total shift of focus from the action complained of to the identity of the plaintiff.

control or coercive power over the school's personnel policies or practices: "[I]n contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Rendell-Baker*, 50 U.S.L.W. at 4828-29.

That is precisely the same situation as in the present case: Provo Canyon School is both an educational and a therapeutic treatment facility. It is subject to regulation of its educational program, but the regulators have shown no interest in its therapeutic program or practices.[7] These latter activities, including the decision to develop and utilize the enjoined procedures, are private in every sense of the word, and the law relative to such decisions could not be more clear:

> [A] state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Blum v. Yaretsky, 50 U.S.L.W. at 4862 (citing other cases). This rule was ignored in the Tenth Circuit's analysis.

The state has exercised no coercive power over Provo Canyon School's therapeutic practices, and a finding that "some of [the plaintiffs in this case] have been involuntarily placed in the School by state officials who were aware of, and approved of, certain of the practices which the district court has now enjoined" (App. A, *infra*, 17a) falls far short of finding "significant encouragement" relative to these private decisions. In the language of the Supreme Court "[*m*]*ere approval of or acquiescence in the initiatives of a private party*

[7] The district court in fact found that, despite the extensive regulation of some aspects of the School, the state had actually failed to monitor the School and had overlooked the enjoined practices and procedures. (App. B, *infra*, 65a-66a; 97a.)

is not sufficient to justify holdin gthe State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 50 U.S.L.W. at 4862 (emphasis added).

In *Blum v. Yaretsky*, this Court held that notwithstanding Medicare funding and extensive state regulations of nursing homes, there is *no state action* in decisions by physicans and nursing staff concerning the level of care required by individual patients. In this case, just as in *Blum*, the practices complained of are the results of "judgments made by private parties according to professional standards that are not established by the State." *Id.* at 4863. Likewise, here as in *Rendell-Baker*, "the critical factor is the absence of any allegation that the [challenged activity] was itself based upon some rule of conduct or policy put forth by the State." *Rendell-Baker*, 50 U.S.L.W. at 4829 (White, J. concurring).

B. *The "State Action" Finding in the Present Case Results in an Inappropriate Award of Attorneys' Fees Under 42 U.S.C. Section 1988.*

The court's finding of state action permitted it to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S. C. § 1988. Under this authority, the defendants now face potential liability to the plaintiffs of approximately $200,000.00,[8] notwithstanding that (1) the jury found unanimously against plaintiffs, no cause of action, and awarded plaintiffs no damages; (2) plaintiffs failed in their attempt to have the School closed; and (3) plaintiffs ulti-

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[8] The district court awarded plaintiffs costs and attorneys' fees of $133,546.00. With accrued interest and an additional $24,789.07 in costs and attorneys' fees requested by plaintiffs in connection with the appeal to the Tenth Circuit, the individual defendants now face a potential liability to plaintiffs of approximately $200,000.00.

mately obtained injunctive relief as to only four of thirteen allegedly unconsitutional practices of the School. That the district court's finding of state action results in such a fee award against the defendants under the facts of this case further supports the position that this was not a proper case for finding state action.

The purpose of the fee award provision is not to punish unsuccessful defendants acting in good faith, *Pickett v. Milam*, 579 F.2d 1118 (8th Cir. 1978), but to help shift the costs of bringing the action to those who are deemed to be the ultimate beneficiaries thereof. A grant of attorneys' fees to plaintiffs "prevailing" under Section 1983 thus is most appropriate when the award is granted against individuals for whom the state must stand ultimately responsible. Because such fee awards are ultimately borne by the taxpayers — the "public" which is deemed ultimately to benefit from an action in the "public interest" — the burden is not great upon any single individual or entity.[9] This justification fails, however, as and to the extent that the

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[9] The committee reports on Section 1988 from both houses of Congress demonstrate that it was not anticipated that the fee award provision would apply to this type of case. According to the House Report (H.R. Rep. No. 94-1558), "Section 1983 is utilized to challenge *official* discrimination, such as racial discrimination imposed by law, . . . [and] has also been employed to challenge unlawful *official* action in non-racial matters." *Id.* at 4-5 (emphasis added). It further reasoned that the "substantial resources available to governmental entities and officials through funds in the common treasury, including the taxes paid by the plaintiffs themselves, . . . provide an ample base from which fees can be awarded to the prevailing plaintiff. *Id.* at 7. The Senate Report (S. Rep. No. 14-1011) observes that "[i]n such cases it is intended that attorneys' fees like other items of costs, will be collected directly from the official, in his official capacity, from funds of his agency or under his control or from the state or local government entity (whether or not the agency or government is a named party)." *Id.* at 5.

state becomes less accountable for the actions of the named defendant.

Plaintiffs prevailed in this case only because the district court determined that the actions of the defendants could be fairly attributable to the state. The fee award under Section 1988 was not granted against the state, however. Nor was it granted against the named defendants in an "official" capacity, since the defendants are not officials of the state. The end result is that the burden of the fee award, if it stands, may not be spread through the taxpaying public as anticipated by Congress in enacting the Civil Rights Fee Awards Act. It becomes the individual burden of three private professionals, Dr. Crist, Dr. Thorne, and Mr. Williams. In that regard it allows plaintiffs to recover significant damages through the back door even though they were denied any direct damage recovery by the jury.

The result is in fact the reverse of the anticipated effect of a fee award in a Civil Rights action. Plaintiffs here were directly supported by ACLU "public interest" monies, plus federal funds provided to the Juvenile Justice Legal Advocacy Project. The fee award in the present case has shifted the burden from this broad public or quasi-public base to three named private individuals .One of these individuals, Dr.D. Eugene Thorne, became directly involved with the Provo Canyon School only *after* plaintiffs had obtained a preliminary injunction against the same four procedures now at issue. He was named as a defendant only because, as new director of the school, he was a necessary party for purposes of any permanent injunctive relief. Nonetheless, the court of appeals upheld the fee award in its entirety against Dr. Thorne. Dr. Thorne and Dr. Crist were subsequently required to post their individual homes as security in lieu of a supersedeas bond in order to pursue an appeal in this case. Such a result

cannot have been intended by § 1988 and demonstrates that the underlying finding of state action is inappropriate and should be reversed.

C. *The Tenth Circuit Court's Decision Conflicts With Constitutional Principles Beyond the State Action Issue.*

1. *The exercise of professional judgment satisfies due process.*

Even if there had been a clear showing of state action in this case and the restrictions of the Fourteenth Amendment were therefore relevant, the holding that the challenged actions deprived plaintiffs of constitutional rights conflicts with relevant Supreme Court cases.

This Court has recently held (subsequent to the district court's ruling in this case) that the due process requirement of the Fourteenth Amendment is satisfied if professional judgment is exercised: "[T]he decision, if made by a professional, is presumptively valid." *Youngberg v. Romeo*, 50 U.S.L.W. at 4684. *See also Parham v. J. R.*, 442 U.S. at 607; *Bell v. Wolfish*, 441 U.S. 520, 544 (1979) (courts should not " 'second-guess the expert[s] . . . on matters on which they are better informed' ").

Qualified expert testimony at trial in this case demonstrated the legitimate therapeutic treatment applications of polygraph testing and the "time out" rooms, the beneficial results of the mail policy and the reasonableness and necessity of using occasional physical restraints. Experts produced by plaintiffs offered contrasting opinions, but their testimony was based on purely philosophical differences and was unsupported by either professional experience or research data. The record suggests no more than that experts could disagree. There was absolutely no basis therein for a conclusion that the challenged actions served no beneficial or con-

structive purpose. The trial court's critical remarks about the School's use of the polygraph and its mail policy, quoted in the Tenth Circuit's opinion (App. A, *infra*, 19a-20a), ignored the substantial evidence of the legitimate, beneficial uses and purposes of these procedures. As the Supreme Court has observed, in language well suited to this case:

> The Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made. . . . [*W*]*e emphasize that courts must show deference to the judgment exercised by a qualified professional.* By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized, Moreover, *there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.*

Youngberg v. Romeo, 50 U.S.L.W. at 4684-85 (emphasis added).

2. *Parental consent satisfies due process.*

By concluding that the challenged practices were "unnecessary" to Provo Canyon School's overall program, the district court not only substituted its own judgment for that of qualified professionals, but it laid a faulty foundation to support its further conclusion that "the defendants may not deprive members of the plaintiff class of constitutional rights . . ., *even with parental consent.*" (App. B, *infra*, 98a [Conclusion of Law No. 11] (emphasis added).)[10]

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[10] The erroneous state action conclusion was apparently also necessary to this conclusion. According to the district court, because "state action is so intertwined with all aspects of the operation of the Provo Canyon School that the school *as a whole*

The district court made no attempt to balance these important competing interests. It thus effectively but erroneously avoided the established principle, based on the "traditional presumption that the parents act in the best interests of their children," *Parham v. J. R.*, 442 U.S. at 604, that great weight should be given to the role of parents or guardians in the selection of a particular institution and in their consent to a particular method of treatment. *Id.* As the Supreme Court has observed, "*most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*" *Id.* at 603 (emphasis added). This Court has consistently recognized that the parents' claim of authority necessary "to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

In *Parham*, this Court held that due process was satisfied where parents, in conjunction with independent medical professionals, determined that their child should be treated in a state mental institution, even though that decision "is not agreeable to a child or because it involves risks." 442 U.S. at 603. Similar parental decision-making has been vetoed by the lower courts in this case.

3. *The enjoined practices do not violate constitutionally protected rights as those practices are reasonably related to legitimate objectives of Provo Canyon School.*

Aside from the issues of state action and parental or professional judgment, there are important and specific rights-oriented issues of constitutional law raised

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operates under color of state law, . . . even 'voluntary' parental decisions or parental consent are subject to constitutional scrutiny." (App. B., *infra*, 74a.)

by this case. While the trial court acknowledged the constitutional standards of *Bell v. Wolfish*, 441 U.S. 520 (1979), and their applicability to this case, those standards were not correctly applied. *Bell* dismissed "compelling necessity" as the standard justifying infringements of constitutional rights of pretrial detainees. It noted that in light of the difficulties of prison administration, restrictions infringing even on *recognized* constitutional guarantees must be evaluated against legitimate institutional objectives, and adopted a test of "reasonable relationship" to effect the appropriate balancing. The district court correctly recognized the breadth of the legitimate objectives of Provo Canyon School and its officials in this case, encompassing "residential treatment, therapy or rehabilitation, in conjunction with education," in addition to the need for effective administration. (App. B, *infra*, 74a.) Nevertheless, the district court incorrectly applied, or failed to apply, the "reasonable relationship" standard of *Bell* to the present case.

The trial court apparently presumed illegitimate purposes for each of the practices and enjoined them on that basis. The court of appeals affirmed with little additional discussion. This decision totally discounted a substantial record of expert testimony and evidence supporting the legitimate and effective therapeutic purposes and beneficial results of the enjoined practices. The district court gave no weight to that evidence as required by *Bell*. The result was an inappropriate intrusion by the court into an area of rational and reasoned decision-making by parents and professionals.

(a) *Use of the polygraph.*

The idea to use the polygraph at Provo Canyon School came from an article in a professional journal and from an understanding that it had been used successfully in other similar schools. Its legitimate thera-

peutic role in the School's treatment program was supported by lay and expert testimony.[11]

The district court revealed the complete substitution of its own judgment for the decisions of parents and qualified professionals in referring to the polygraph as a "device [which] is inherently coervice and [which] represents the most serious intrusion into the very thought-process of an individual," used "to chill even individual thought and to chill expression of thought" — "an 'instrument of terror' rather than therapy." (App. B, *infra*, 76a).

The court of appeals did not point to a specific provision of the Constitution violated by use of the polygraph, and its use certainly is not unconstitutional *per se*. Where there is no *clear* abuse of constitutional right, and where qualified professionals have selected this method of therapeutic treatment with parental consent, the standards of *Bell* and *Youngberg v. Romeo*, *supra*, require the court to defer to the judgment of the professionals. The court of appeals' failure to give deference to these professionals and parental choices requires reversal by this Court.

(b) *Mail restrictions.*

The district court enjoined all monitoring of outgoing mail. (App. B, *infra*, 99a.) The lower court, upheld by the court of appeals, failed altogether to apply the reasonable relationship test, even though it stated that such a test was required to analyze this issue. Instead of considering the possible objectives of the mail monitoring policy and balancing these values against the burden of any alleged deprivation, the district court described the policy from the outset as self-serving and constitutionally impermissible — simply

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[11] Sample excerpts from the trial transcript of testimony supporting the use of the polygraph are reproduced at App. D, *infra*, 106a-111a.

"another vehicle for preventing any criticism of the school." (App. B, *infra*, 77a.)

It is important to recognize the role of the mail policies in the realization of the broad and difficult objectives of the Provo Canyon School program, and due deference should be given, as it was in *Bell, Youngberg, Parham,* and *Procunier v. Martinez,* 416 U.S. 396 (1974), to the parental and professional judgment in these difficult areas and the rational nexus between the policies formulated and legitimate objectives. Evidence that the mail monitoring policies were not unreasonably oppressive and that they achieved beneficial results consistent with and thus reasonably related to the legitimate purposes of the school was uncontroverted on the record.[12] Those policies were approved by parents. Even so, this evidence was apparently afforded little weight against the substituted judgment of the trial court and court of appeals.

(c) *Use of "time-out" rooms.*

The constitutional basis for the district court's decision to prohibit the use of the "time-out", "prescription rooms" or "P rooms" "for any reason other than to contain a juvenile who is physically violent and dangerous to himself or others," (App. B, *infra*, 100a) is not clearly stated in the court's findings or conclusions, or in its memorandum opinion. The court apparently believed that their use was not carefully enough controlled or subject to standards as clear as those applied by other institutions, or that existing standards were not always observed. (App. B, *infra*, 78a.) Even if the latter were true, instances of inapproprate use cannot justify the court's broad proscription, depriving the school of appropriate uses of the rooms as well,

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[12] Sample excerpts from the trial transcript of testimony supporting the school's mail monitoring practice is reproduced at App. D, *infra*, 111a-114a.

as supported by expert testimony.[13] The district court has again substituted its judgment for that of professionals, contrary to the law stated in *Bell* and *Youngberg*.

(d) *Use of physical restraint.*

The district court's injunction against the school's use of physical force is overly broad, prohibiting the use of physical force for *any* purpose other than to restrain a physically violent student or to overcome physical resistance.[14] As such, the injunction restricts the school officials' own privilege under common law to impose reasonable but not excessive force to discipline a child. As this Court acknowledged in *Ingraham v. Wright*, 430 U.S. 651 (1977), "[t]he prevalent rule in this country today privileges such force as a teacher or administrator reasonably believes to be necessary for [the child's] proper control, training or education." *Id.* at 661.

A further lesson from *Ingraham* was likewise ignored — the clear intimation from this Court that proper recourse for unprivileged use of physical force lies in the state courts under appropriate tort or criminal law, and not in the federal courts under Section 1983.

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[13] For example, Dr. Paul Whitehead, Chairman of the Department of Child Psychiatry at Primary Children's Medical Center in Salt Lake City, Utah, testified that the use of quiet rooms "is a reasonable method of obtaining control for a boy who's out of control," and explained that "the theoretical basis is to take an uncontrolled child and place them in an area of low stimulus to help them regain control."

[14] The district court itself acknowledged in its opinion that the "hair dance" — the name given to a method of physical restraint by which a student is held by one arm and the hair of his head—is "designated as a means of controlling physically violent juveniles without causing them undue physical harm." (App. B, *infra*, 78a). Use of this procedure for purpose other than to control violent students was contrary to school policy.

See also Paul v. Davis, 424 U.S. 693 (1976); *Baker v. McCollan*, 443 U.S. 137 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted. Because the error of the court of appeals is manifest in light of this Court's opinions in *Rendell-Baker*, *Blum*, *Jackson*, *Youngberg*, *Parham* and others, the Court should consider summary reversal.

Respectfully submitted,

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FEBRUARY 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 80-1569 and 81-1407
(Consolidated Cases)

TIMOTHY MILONAS, JR., and KENNETH RICE, by and through their Attorney and Guardian Ad Litem, KATHRYN COLLARD, on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES,

v.

JACK L. WILLIAMS, Owner and Administrative Director, Provo Canyon School; ROBERT H. CRIST, Owner and Medical Director, Provo Canyon School; D. EUGENE, Owner and Executive Director, Provo Canyon School, DEFENDANTS-APPELLANTS,

JOHN F. MCNAMARA, Director and Administrator, Interstate Compact on Juveniles, DEFENDANT.

Appeal from the United States District Court
for the District of Utah, Central Division
(D.C. No. C-78-0352)

Before MCWILLIAMS and SEYMOUR, *Circuit Judges*, and BRIMMER, *District Judge.**

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*Honorable Clarence A. Brimmer, Jr., Chief Judge, U.S. District Court for the District of Wyoming, sitting by designation.

The Provo Canyon School for Boys, located near Provo, Utah, is a private school for boys between the ages of twelve and seventeen. Timothy Milonas, Jr., age fifteen, and Kenneth Rice, age sixteen, then students at the Provo Canyon School, brought the present action against the owners and operators of the Provo Canyon School.[1] Also named as parties defendant were various agencies, officers, and employees of the State of Utah.[2]

The individual plaintiffs, Milonas and Rice, challenged the education, treatment and conditions of confinement of juvenile boys placed at the Provo Canyon School and averred that the school administrators, acting under the color of state law, had caused the plaintiffs to suffer and to be subjected to cruel and unusual punishment, antitherapeutic and inhumane treatment, and denial of due process of law. Minolas and Rice

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[1] Jack L. Williams, owner and administrative director of the Provo Canyon School, and Robert H. Crist, owner and medical director of the Provo Canyon School, were named as parties defendant in the original complaint filed on September 21, 1978. D. Eugene Thorne became the executive director of the Provo Canyon School on April 1, 1979, and was added as a party defendant on September 14, 1979. These defendants are appellants herein.

[2] State defendants were: Anthony W. Mitchell, Director of the Utah Department of Social Services; the Utah Department of Social Services; James P. Wheeler, Director of the Utah Division of Family Services; the Utah Division of Family Services; John F. McNamara, Director and Administrator of the Interstate Compact of Juveniles; Walter D. Talbot, Superintendent of Public Instruction, Utah State Board of Education; and the Utah State Board of Education. These defendants were either dismissed from the lawsuit or entered into consent decrees. In this appeal, none of these defendants challenge the district court's disposition of the matter.

sought class action certification and, both for themselves and the members of the class, asked for money damages and declaratory and injunction relief pursuant to 42 U.S.C. § 1983 (1976). The named plaintiffs also alleged that they had been denied a free appropriate public education and sought relief pursuant to the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1976) and Section 504 of the Rehabilitation Act of 1973 29 U.S.C. § 794 (1976).[3]

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[3] The claim against defendant McNamara, the director and and administrator of the Interstate Compact on Juveniles for the State of Utah, was that he had failed to administer adequately his supervisory responsibilities regarding the placement of youths in Utah institutions. It was McNamara's job to supervise the placement in Utah of juveniles from other states sent to Utah by juvenile courts and other welfare agencies. Milonas and Rice alleged that McNamara's negligence had resulted in their placement at the Provo Canyon School, where they were subjected to abusive treatment. During the course of the proceedings in the district court, the plaintiffs and defendant McNamara entered into a consent agreement in which defendant McNamara agreed, *inter alia*, to request that out-of-state officials remove boys from the Provo Canyon School and refrain from placing any other juveniles at the school.

The claim against defendant Talbot, the superintendent of public instruction for the State of Utah, and defendant Utah State Board of Education, was that each had failed to provide an adequate free appropriate public education for all handicapped children in the State of Utah as required by the Education for All Handicapped Children Act, 20 U.S.C. § 1412(2)(B) (1976). During the course of the proceedings in the district court, these defendants also entered into a consent decree with the plaintiffs. In this consent decree, the Utah defendants agreed, *inter alia*, that they were subject to the provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1976), and the Education for All Handicapped Children

Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the district court provisionally certified the class. For purposes of the preliminary relief requested, the class was described as consisting of all juveniles residing at the Provo Canyon School during the pendency of the civil rights action. At that time, the district court also entered a preliminary injunction that enjoined four "behavior-modification" practices then in effect at the school.

The plaintiffs' claim for money damages was tried to a jury; the district court reserved for its determination the claims for declaratory and injunctive relief. At the conclusion of a lengthy trial, the jury returned a verdict in favor of the defendants on the damages issue. Nonetheless, the trial judge later entered a permanent injunction as to those four school administrative practices that were the subject of the preliminary injunction previously entered. For purposes of this permanent relief, the district court certified a class consisting of all boys residing at the Provo Canyon School as of the date of the permanent injunction and in the future.

The permanent injunction specifically prohibited the defendants from: (1) opening, reading, monitoring or censoring the boys' mail; (2) administering polygraph examinations for any purpose whatsoever; (3) placing boys in isolation facilities for any reason other than to contain a boy who is physically violent; and (4) us-

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Act, 20 U.S.C. §§ 1401-1461 (1976), and the regulations promulgated thereunder; to adopt regulations and procedures to implement these federal laws in the State of Utah; to monitor institutional compliance with the new state guidelines; and to provide a safe and free appropriate public education to all handicapped children in the State of Utah.

ing physical force for any purpose other than to restrain a juvenile who is either physically violent and immediately dangerous to himself or others, or physically resisting institutional rules.

The district court later found that the plaintiffs were the "prevailing party" pursuant to 42 U.S.C. § 1988 (1976) and that they were entitled, therefore, to an award of attorneys' fees. The district court filed an exhaustive memorandum opinion wherein it made findings of fact and conclusions of law. This opinion was not published. The district court then entered final judgment and fixed the attorneys' fees at $133,546.54. For a discussion of the procedural history of this appeal, see *Milonas v. Williams*, 648 F.2d 688 (10th Cir. 1981).

The Provo Canyon School is privately owned and operated, although it does receive funds from both state governments and the United States.[4] The school was established in 1973 for the primary purpose of educating teenage boys whose problems are so severe that

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[4] Tuition at the Provo Canyon School is $1,600 per month. However, from the date of its inception as an institution in 1973, the Provo Canyon School has received significant amounts of government money to sustain its operations. Many of the boys are placed at the school by local school districts for special education purposes. School districts in California, Wyoming, Utah, Illinois, North Carolina, Alaska, New York, Minnesota, Washington, and Idaho have sent boys to the facility. These placements are accomplished through contractual arrangements between the local school officials and the Provo Canyon School administrators. Funding for the boys' special education comes from federal and state treasuries pursuant to the Education for All Handicapped Children Act and corresponding state special education laws. In 1979, the school received $566,278.24 from local school districts.

their treatment and education require a restricted, therapeutic environment. All of the boys admitted to the school have problems of one sort or another, including physical, psychological, and emotional problems, and are handicapped by a general inability to conform to normal behavioral standards. The district court described the school as follows:

> The Provo Canyon School is not a school in the traditional, ordinary or classic sense. It does offer classes on a secondary level to its resident population, and in most instances does a good job in its formal teaching. Provo Canyon School is also a correctional and detention facility. Students are restricted to the grounds. Students are confined. Some students are locked in and locked up with varying degrees of personal liberty restored as each progresses through the institutional program. If a student leaves without permission, he is hunted down, taken into custody and returned.
>
> Provo Canyon School is also a mental health facility. Adolescent males perceived to have mental health or emotional difficulties or who are

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Additional governmental funding came from juvenile courts and probation departments and county governments and welfare agencies. The figures below demonstrate that the school relied heavily upon government financing.

YEAR	GOVERNMENT FUNDS RECEIVED	PERCENT OF TOTAL FUNDS
1973	$ 41,954.13	12.66
1974	131,196.66	25.29
1975	276,326.10	33.74
1976	118,150.31	13.22
1977	104,258.01	15.96
1978	434,225.50	21.00
1979	629,917.78	33.91

chemically dependent persons, are counseled and treated. Adolescent males with forms of learning disability, physical, mental or emotional, are housed, counseled and "taught."

The student population, intermixed and various, is subjected to a form of "behavior modification" described by those who run the school as eclectic. Some of its salient features are isolation from the outside world, little or no communication with the outside world, physical confinement, physical punishment, progressive restoration of liberty, investigation and evaluation of student "attitude" and "truthfulness" and future conduct" through the use of a machine, and counseling.

. . . .

Regardless of origin, condition or motivation, once arrived, each person during the beginning phases of the school program was locked in, isolated from the outside world, and whether antisocial, crippled or learning disabled, was subject to mandated physical standing day after day to promote "right thinking" and "social conformity." Mail was censored. Visitors were discouraged Disparaging remarks concerning the institution were prohibited and punished. To "graduate" from confinement to a more liberated phase, one had to "pass" a lie detector test relating to "attitude," "truthfulness" and "future conduct." Some failed to pass and remained in confinement for extended periods of time.

Students generally are admitted to the Provo Canyon School at the insistence of one or both of their parents. Typically, the parents have had extreme disciplinary problems and being unable to control their child, have contacted the Provo Canyon School as a "last resort." Other boys are received at the school di-

rectly from juvenile courts and probation officers from across the nation. Many of the youths are placed at the Provo Canyon School by the boy's local school districts, with tuition funding coming from state and federal agencies pursuant to state special education laws and the federal Education for All Handicapped Children Act.

Plaintiff Timothy Milonas, Jr., had resided in the State of Nevada prior to being involuntarily committed to the Provo Canyon School by his mother. Milonas' commitment was a condition of probation imposed by a Nevada juvenile court. Milonas' father thereafter received a coded letter from his son, which letter implied that the son needed assistance. Because of that letter, Milonas' father independently contacted counsel regarding the school and how it was being run. Kenneth Rice, the other individual plaintiff, had resided in Alaska until his involuntary commitment to the Provo Canyon School. Rice was placed in the school pursuant to an order of an Alaska juvenile court. Four months after he was admitted to the Provo Canyon School, Rice ran away from the school, and, before he was returned, he made contact with an attorney and complained about conditions at the school. As a result of the complaints thus made by Milonas and Rice, the present action was instituted.

Class Certification

Both Milonas and Rice were students at the Provo Canyon School on the date this action was commenced. On the date the complaint was filed, counsel for Milonas and Rice, fearing that the boys would be subject to retaliation by the defendants because of the commencement of the lawsuit, sought and obtained an immediate hearing before the district court. Based on

such hearing and a stipulation between the parties, the district court ordered that Milonas and Rice be removed temporarily from the school and placed for the time being with the Utah State Division of Family Services. Each boy sought damages and injunctive relief for himself, and, in addition, they also asked for damages and injunctive relief for a class which they sought to represent. The class, according to the complaint, consisted of "all juveniles who have been, are now, in the future will be placed at the Provo Canyon School." The district court provisionally granted plaintiffs' motion for class certification, and, later, at the conclusion of the trial, such grant was made permanent.

The first issue raised by the defendants in this appeal concerns the propriety of class certification. The defendants contend that the district court erred in granting plaintiffs' request for class certification. This particular contention is based on either of two grounds. First, the defendants assert that by leaving the Provo Canyon School on the day that the lawsuit was filed, pursuant to the order of court to which reference was made above, Milonas and Rice lost membership in the class that they sought to represent. The defendants reason that Milonas and Rice, being "outsiders" at the time of class certification, could not represent those boys "inside" the school. In essence, the defendants aver that the named plaintiffs lacked standing to pursue the lawsuit on behalf of the class members. Second, the defendants assert that the individual claims of Milonas and Rice were not "typical" of the claims of the class members and, therefore, at the time of class certification, Milonas and Rice were merely "officious intermeddlers." Fed. R. Civ. P. 23(a)(3). We are not pursuaded by either of these arguments.

It is axiomatic that an uninjured plaintiff cannot bring suit on behalf of an injured class. U.S. Const. art, III, § 2, cl. 1;*Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Bailey v. Patterson*, 369 U. S. 31, 32-33 (1962). It is well settled, however, that a named plaintiff may continue to represent a class that has been certified as such even after the named plaintiff's personal stake in the outcome of the litigation has been mooted. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Furthermore, "[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. In such instances, the district court may apply a "relation back" theory and grant late certification in an otherwise moot case and thereby prevent mootness. *Id.; Napier v. Gertrude*, 542 F.2d 825, 828 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977). *See generally* Note, Class Standing and the Class Representative, 94 Harv. L. Rev. 1637 (1981).

The key to whether a particular case falls within that "narrow class of cases in which the termination of a class representative's claim [prior to class certification] does not moot the claims of the unnamed members of the class," *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), is whether the claim on its merits is "capable of repetition, yet evading review." *United States Parole Comm'n v. Geraghty*, 455 U.S. 388, 398 (1980).[5] Ours is such a case.

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[5] The Supreme Court's most recent pronouncement on this matter appears in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980), wherein the Court noted that

> [a]lthough one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes

When the present action was instituted, Milonas and Rice were students in the Provo Canyon School, and as such were members of the class they sought to represent. Understandably, the boys were removed from the Provo Canyon School at the earliest possible date. The district court could not have been expected to rule on a class certification motion prior to the date of the boys' removal from the school premises. Also the district court's order placing the boys in the care of state officials was temporary in nature and, therefore, it was possible that the boys would be returned to the school. In our view, the fact that Milonas and Rice were removed temporarily from the school as a precautionary measure does not mean that they thereby lost their "personal stake" in the controversy. And most certainly the controversy itself was postured in a truly adversary setting. It is our conclusion, therefore, that Milonas and Rice satisfied the constitutional requirement of presenting a live case and controversy to the district court on behalf of themselves and the members of the class.

is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. E.g., *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class action context. . . . But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake. . . . Since the litigant faces

Defendants' "lack of typicality" argument is based primarily on the fact that Milonas' tuition at the school was funded by his parents and that Rice's tuition was funded by the State of Alaska, whereas other students were funded by different financial sources, including federal special education money. According to counsel, such demonstrates that the individual claims of Milonas and Rice are not typical of the class's claim. We disagree.

We note that in addition to Article III standing requirements, Fed. R. Civ. P. 23(a) lists four prerequisites to the certification of a class and the maintenance of a class action.[6] Upon the failure of the class representative to meet any one of the prerequisites of the rule, class certification will be denied. This determination, however, is a matter within the sound discretion of the trial court and the trial court's conclusions as to whether the class representative has demonstrated that the numerosity, commonality, typicality, and adequacy of representation requirements have been met "will not be disturbed absent a showing of abuse of that discretion." *Rex v. Owens* ex rel. *State of Oklahoma*, 585 F.2d 432, 436 (10th Cir. 1978).

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some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

[6] Fed. R. Civ. P. 23(a) provides that a class action may be maintained only if the following requirements are met: (1) the class is so numerous that the joinder of all class members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

In determining whether the typicality and commonality requirements have been fulfilled, either common questions of law or fact presented by the class will be sufficient. Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist. *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975); *Like v. Carter*, 448 F.2d 798, 802 (8th Cir. 1971). As we have stated previously, every member of the class need not be in a situation identical to that of the named plaintiff. *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1075).[7]

Milonas and Rice, together with the class which they were certified to represent, have common claims against the defendants, i.e., that the disciplinary practices carried on at the school violated various constitutional and statutory rights of the individual plaintiffs and of the class. Regardless of their source of funding or, indeed, their individual disability or behavioral problems, all of the boys at the school were in danger of being subjected to the four enjoined "behavior-modification" practices. In our view, the typicality and commonality requirements of Fed. R. Civ. P. 23(a)(3) have been met. In sum, the district court did not err in granting class certification.[8]

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[7] Defendats' reliance upon our decision in *Albertson's, Inc. v. Amalgamated Sugar, Inc.*, 503 F.2d. 458 (10th Cir. 1974), is misplaced. In that case, we upheld the trial court's denial of class certification because we found that the party seeking to represent the class had interests antagonistic to the persons he sought to represent. *Id.* at 463. Such is not the case in the instant action.

[8] No challenge is made on appeal to the district court's finding that the requirements of Fed. R. Civ. P. 23(a)(1) and 23(a)(4) were satisfied.

State Action

Section 1983, 42 U.S.C. § 1983 (1976) provides, in essence, that any person who, under the color of state law, causes another to be deprived of rights secured by the Constitution or laws of the United States shall be liable to the injured party in an action at law or a suit in equity. 28 U.S.C. § 1343 (1976) confers original jurisdiction on federal district courts to hear proceedings brought under Section 1983. In the instant case, the plaintiffs alleged, and, at trial, attempted to show, that their constitutional and statutory rights had been violated by the owners and operators of the Provo Canyon School and that, in so doing, the defendants were acting under the color of state law. In awarding to the plaintiffs injunctive relief, the district court found that the enjoined practices were carried out under the cloak of state action. This conclusion was based on the fact that various states, be it through their juvenile courts or their school districts, had placed the plaintiffs, or at least many members of the class in the institution, and that there was significant funding and regulation by the state. We agree.[9]

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[9] Having concluded that the district court had jurisdiction to issue the injunction under 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343 (1976), we need not decide whether there was independent jurisdiction under the Education of all Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461 (1976) or under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976).

The Education for All Handicapped Children Act of 1975 is a funding statute, requiring states seeking and receiving funds under the Act to provide a free appropriate public education for all school age children in their jurisdiction. The requirements of the Act are set forth in the form of conditions

When a private party, as compared to a state employee, for example, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under Section 1983, must show that the private party was acting under the color of state law. The reason for this is fundamental. The fourteenth amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to the acts of the state, not to acts of private persons or entities. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 11 (1883). And Section 1983, which was enacted pursuant to the authority of Congress to enforce the fourteenth amendment, prohibits interference with federal rights by persons acting under color of state law. Conduct that constitutes "state action" for fourteenth amendment due process purposes is also action "under color of state law" for purposes of Sec-

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on the receipt of federal funding. For a general review of the purposes of this Act, and the meaning of the term "free appropriate public education," *see generally Hendrick Hudson Dist. Bd. of Educ. v. Rowley* ..... U.S. ..... (1982); Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1 (1981); Note, Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103 (1979).

Section 504 of the Rehabilitation Act of 1973 provides, in pertinent part, that "[n]o otherwise qualified individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (Supp. III 1979). For a general review of this Act, see *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1327 (10th Cir. 1981).

tion 1983 civil rights suits. *Lugar v. Edmondson Oil Co.*, ... U.S. ..... (1982); *United States v. Price*, 383 U.S. 7878, 794 n.7 (1966). The United States Supreme Court has stated that the ultimate issue in determining whether a person is subject to suit under Section 1983 is whether the alleged infringement of federal rights is fairly attributable to the state. *Rendell-Baker v. Kohn*, ... U.S. ..... (1982).

In our view, the district court's finding that the defendants, owners and operators of the Provo Canyon School, were acting under color of state law finds support in the record and is in accord with applicable law. In the instant case, the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) *Browns v. Mitchell*, 409 F.2d 593, 595 (10th Cir. 1969). Many of the members of the class were placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents. Detailed contracts were drawn up by the school administrators and agreed to by the many local school districts that placed boys at the school. There was significant state funding of tuition and, in fact, the school itself promoted the availability of public school funding in its promotional pamphlet. There was extensive state regulation of the educational program at the school. These facts demonstrate that there was a sufficiently close nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983.

In the district court, defendants relied heavily on *Rendell-Baker v. Kohn*, 641 F.2d 14 (1st Cir. 1981). The defendant school involved in *Rendell-Baker* was

indeed quite similar in its operation to the Provo Canyon School. The parties claiming a Section 1983 violation in that case were employees discharged from the school. The holding of the First Circuit in *Rendell-Baker* was that in discharging the plaintiffs the school officials had *not* acted under the color of state law. In so ruling, the First Circuit did comment, however, that *students* in the school there involved "would have a stronger argument than do plaintiffs that the school's action *toward them* is taken 'under color of' state law, since the school derives its authority over them from the state." 641 F.2d at 26 (emphasis in original).

On review, the Supreme Court affirmed the First Circuit's decision. *Rendell-Baker v. Kohn*, ...U.S. ..... 1982. The Supreme Court phrased the issue there to be resolved as "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under the color of state law *when it discharged certain employees.*" *Id.* (emphasis added). As indicated, the Supreme Court held that state funding and regulation was not sufficient to support a finding of state action in the discharge by the private school of employees of the school. The Court recognized that "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Id.* To us, *Rendell-Baker* differs from the present case in at least one important respect. The plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state officials who were aware of, and approved of, certain of the practices which the district court has now enjoined. *Rendell-Baker* does not control the Section 1983 issue before us.

The Enjoined Practices

As indicated, the district court entered a permanent injunction which enjoined the defendants from their use of the polygraph, monitoring and censoring of mail, use of isolation rooms, and use of excessive physical force. In this regard, the district court found that the defendant's actions violated the first and fourteenth amendment rights of the plaintiffs.

The trial of this case was a protracted one, lasting some four weeks. The district court heard testimony from numerous educational experts, present and former students in the school, present and former employees of the school, and from the defendents themselves. Needless to say, the testimony of these witnesses was in conflict to some appreciable degree. The plaintiffs' witnesses tended to paint a picture of undue punishment, if not outright brutality, in no wise related to the school's educational program. The defendants' witnesses, on the contrary, indicated that the school's disciplinary practices were a necessary adjunct to its educational program, and that the use of force or coercion was limited to those extreme cases where a student was "out of control" and posed a threat to himself or others. It was on this sort of a record that the district court permanently enjoined four disciplinary practices. At the same time, the district court refused to enjoin nine other practices which the plaintiffs also sought to enjoin.

As noted, the district court did enjoin the defendants' use of the polygraph. Specifically, the district court made the following findings concerning the defendants' use of the polygraph:

As to the polygraph, the court has difficulty envisioning a set of facts that would justify the use of the polygraph on juveniles, either in the name of "therapy" or for security That set of facts certainly did not exist at Provo Canyon School. Although there was some evidence offered in support of justification, and some evidence of "voluntary" use of the polygraph by boys, this device is inherently coercive and represents the most serious intrusion into the very thought processes of an individual. It was certainly used in a coercive manner at the Provo Canyon School. Refusal to take the polygraph resulted in punishment hours that boys had to sit or stand off and meant that the boy could not advance within the school program and could not leave the school. Boys were subject to punishment not only for what the polygraph revealed that they had done, but also for what the polygraph showed they had *thought* about doing. Until this court's Preliminary Injunction, all boys at the school were subject to the same polygraph policies, even those [boys] placed exclusively for special education and those [boys] with no record of juvenile offenses.

The school also used the polygraph to prevent the flow of any negative information about the school. Boys entered into agreements and even formal contracts with the school to obey the rules and avoid "negative thinking," which included saying bad things about the school. The polygraph was used to test performance of these agreements or contracts. Boys even had to agree that after they left they would not say bad things about the school, and boys knew that any *intention* to violate that agreement would be revealed by the polygraph, and would prevent or delay their departure.

As concerns the defendants' monitoring of the students' mail, which the district court enjoined, the district court found as follows:

> These policies were another vehicle for preventing any criticism of the school. All outgoing mail was read and boys were forced to "rewrite" letters containing things perceived as "untrue" by therapists, or containing "negative thinking" such as criticism of the school. Therapists even wrote comments such as "manipulative" in the margins of letters that boys were allowed to send. Boys knew that their outgoing mail was being read, which chilled the content of their letters even before they were written. One wonders why an institution that seems to be as proud of its programs as the Provo Canyon School would go to such great lengths to avoid critical comment.

As indicated, the Provo Canyon School maintained and used so-called "isolation rooms," also referred to as "prescription rooms," or "quiet rooms," or "time-out rooms." These rooms were approximately 4′ x 8′ x 9′, were carpeted, contained no furniture, and had one small window in the door. Individual students were placed in these rooms as punishment for the violation of school rules or when the boys were believed to be emotionally or physically out of control. Boys placed in the isolation rooms were checked periodically by school authorities. As of the time this suit was commenced, the boys were not kept in the isolation room for more than 24 hours.

In regard to the use of physical force at Provo Canyon School, the evidence was conflicting, with the defendants' witnesses testifying, in effect, that the degree of force used was necessary and reasonable, and with the plaintiffs' witnesses testifying, in effect, that

unreasonable force frequently was used on the students. Brief mention should be made of the defendants' use of a practice nick-named the "hair dance." The Provo Canyon School Manual suggested that in dealing with a belligerent student, a school employee should grab one of the student's arms and clutch the boy's hair with his other hand. Such grabbing and pulling of the hair was believed to be the least harmful and, at the same time, the most effective way of bringing a student under control. In connection with the use of force at the Provo Canyon School, the district court found as follows:

> [A]lthough written school policies forbade excessive or inappropriate use [of force], actual practices varied from written policies, and excessive and inappropriate use of isolation and physical force took place. The "hair dance," designed as a means of controlling physically violent juveniles without causing them undue physical harm, was used in response to conduct other than physical violence or physical resistance, was used as punishment rather than simply for immediate control, was used as a threat, and on occasion resulted in the very physical injuries it was supposed to prevent.
>
> [T]he use of the term "out of control" as a justification for the basically uncontrolled discretion in subjecting juveniles to the P-Room and hair dance permitted unreasonably harsh school responses to the conduct of disturbed boys.

It was the defendants' position in the district court, as it is on appeal, that the practices enjoined by the district court are reasonably related to considerations of administration and security and are rationally directed toward the realization of legitimate and impor-

tant objectives of education, therapy, and social rehabilitation. In this regard, the defendants accept the basic constitutional standards enunciated in *Bell v. Wolfish*, 441 U.S. 520 (1979), and assert that, under *Bell*, institutional restrictions which actually do infringe on specific constitutional guarantees still must be evaluated in the light of the legitimate objectives of the institution, and that a court should adopt a "reasonable relationship" test to effect the necessary balancing.

A person involuntarily confined by the state to an institution retains liberty interests that are protected by the due process clause of the fourteenth amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979). Such person has the right to reasonably safe conditions of confinement, the right to be free from unreasonable bodily restraints, and the right to such minimally adequate training as reasonably may be required by these interests. *Youngberg v. Romeo*, ... U.S. ..... (1982). Such person also has the right to be free from censorship of correspondence, because first amendment rights do not terminate upon institutionalization. *Procunier v. Martinez*, 416 U.S. 396 (1974). And such person has the right to the privacy of his own thoughts, which cannot be probed by use of polygraph examinations.[10]

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[10] The eighth amendment's proscription against "cruel and unusual punishment" does not apply in a situation, such as we have in the instant case, where the involuntarily confined person has not been adjudicated guilty of any crime. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright* 430 U.S. 651 (1977). Any institutional rules that amount to punishment of those involuntarily confined prior to an adjudication of guilt of criminal wrongdoing are violative of the due process clause per se. The district court below properly

In assessing institutional restrictions, courts must take into account both the liberty interests of the individual and the legitimate needs of the institution for order and security. The district court below properly undertook a balancing process to determine whether the challenged disciplinary practices were so onerous as to overcome the legitimate administrative and security interests of the school. We are in accord with the district court's findings and conclusions on this matter because such are amply supported by the record. Furthermore, we believe that the district court's conclusions of law are in accord with the applicable cases. *See Procunier v. Martinez*, 416 U.S. 396 (1974); invalidating mail censorship by prison officials; *Lavine v. Wright*, 423 F. Supp. 357, 366 (D. Utah 1976) (upholding use of polygraph by *prison* officials for limited *purpose* only); *Pena v. New York State Div. for Youth*, 416 F. Supp. 203 (S.D.N.Y 1976) (use of isolation room for punishment unconstitutional); and *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) (use of undue physical force invalidated).

Parental Consent

As above indicated, in many instances a parent not only consented to the placement of a son in the Provo Canyon School, but also knew in advance of the very disciplinary practices enjoined by the district court. On appeal, the defendants argued that the district court failed to give "proper deference" to such parental consent. In this connection, it is *not* defendants' position that parental consent permits the defendants

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rejected the plaintiffs' claim that the Provo Canyon School had violated rights guaranteed by the eighth amendment.

to violate students' constitutional rights. Rather, the defendants' position on this particular matter is that, in determining whether the enjoined practices bore a reasonable and rational relationship to the legitimate objectives of the Provo Canyon School, the district court failed to take into consideration, or give proper weight to, the fact that some parents consented to the enjoined "behavior modification" practices. We are not persuaded by this argument.

Children, as well as adults, have substantial liberty interests that are protected from state action by the fourteenth amendment. *See Addington v. Texas*, 441 U.S. 418, 425 (1979); *In re Gault*, 387 U.S. 1, 27 (1967). These liberty interests include the right not to be confined unnecessarily for medical treatment. *Parham v. J.R.*, 442 U.S. 584, 600 (1979). Concomitant with this right is the right to be free of unnecessary restrictions of other fundamental rights once confined to a state institution. The district court below recognized that the boys placed at the Provo Canyon School retained certain fundamental rights that could be curtailed only if necessary to maintain order and security at the school. As indicated, the trial court, after balancing the various interests, and noting, incidentally, that some parents who had placed their boys in the school had knowledge of the school's disciplinary practices, concluded that the four enjoined practices were not necessary and that they unduly burdened the boys' constitutional rights. While judgments of a parent are to be considered by the court in determining the "necessity" of burdens placed upon children's fundamental rights, a parent cannot authorize the state to limit a child's liberty without showing good cause therefor. *Cf. Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979);

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-75 (1976). The district court's balancing process comported with proper constitutional procedure. We are in accord with its conclusion that the fact that some parents approved of the enjoined practices does not compel a finding that the practices were necessary.

Attorney's Fees

The district court awarded to the plaintiffs attorneys' fees in the amount of $133,546.54 under 42 U.S.C. § 1988 (1976). On appeal, the defendants argue that if this Court should vacate the permanent injunction, then the plaintiffs would not be a "prevailing party," and, in such circumstances, the award of attorneys' fees should also be vacated. We agree. However, we are not reversing the district court in the present proceeding, but rather affirming.

The Honorable Bruce S. Jenkins, a United States District Judge for the District of Utah, presided over the trial of this case and later, in a separate hearing, awarded attorneys' fees. Prior to the hearing on attorneys' fees, the defendants sought to have Judge Jenkins disqualify himself from setting the fee. The basis for this challenge was that, in 1965, long prior to his appointment as a federal district court judge, Judge Jenkins served as a member of the advisory council for the local chapter of the American Civil Liberties Union. Defense counsel argued that the American Civil Liberties Union represented Milonas and Rice in the present proceeding and that, in fact, it was the real party in interest. Judge Jenkins, who had handled pretrial matters and the lengthy trial, declined to disqualify himself in connection with the setting of attorneys' fees. We find no error. Indeed, the ground for

disqualification, i.e., some minor connection with the ACLU fifteen years ago, is most tenuous on its face.

Defense counsel also suggests that the award of attorneys' fees against the defendant Dr. D. Eugene Thorne was not justified. We disagree. At the time of the entry of the permanent injunction, Dr. Thorne, along with Jack L. Williams and Robert H. Crist, was a co-owner and co-operator of the Provo Canyon School. Although Williams and Crist had been associated with the school from its inception, Dr. Thorne became associated with the school shortly after the commencement of the present action, initially as paid consultant, and later as executive director and part owner of the school. And, as indicated, he was serving as the executive director and part owner of the school when the permanent injunction was entered. We find no error in including Dr. Thorne as one of the defendants against whom the award of attorneys' fees was entered.

The Consent Decrees

The three co-owners of the Provo Canyon School were not the only defendants named in the complaint. Also named as parties defendant were the Utah Board of Education and Walter D. Talbot, Superintendent of Public Instruction for the State of Utah. A consent decree was entered as to the Utah Board of Education and Talbot. This consent decree related to the regulation and monitoring by these particular defendants of special educational services for handicapped children in "private" institutions in the State of Utah, which institutions were receiving monies from the State of Utah, such monies, in turn, having been received from the federal government under the provisions of the Education for All Handicapped Children Act. In this connection, see also note 3, *supra*.

Another defendant named in the complaint was John F. McNamara, the Administrator of the Interstate Compact on Juveniles for the State of Utah. Juvenile courts in states outside of Utah placed boys at the Provo Canyon facility. There was some dispute as to whether these placements were, strictly speaking, made under the interstate compact, or made directly by the placing state with the school. In any event, McNamara did make monthly visits to these out-of-state students and forwarded reports to the sending states concerning the students' health and general welfare.

The plaintiffs and McNamara also entered into a consent decree in which McNamara agreed: (1) not to approve any future out-of-state placements in Provo Canyon School or any other private juvenile educational facility in Utah unless such facility was approved by the Utah Division of Family Services; (2) to request, after thirty days, out-of-state sending officials to remove their placements from unapproved Utah facilities; and (3) to notify out-of-state Interstate Compact Administrators of the terms of the consent decree. As a part of the present appeal, the co-owners of the Provo Canyon School seek to have set aside and vacated this consent decree entered against McNamara.

The general rule is that a nonsettling party has no standing to appeal a consent decree which does not bind him and interferes with no legal relationship between the nonsettling party and the settling parties, even though the nonsettling party may have sustained some economic loss as a result of the consent decree. *Utility Contractors Ass'n of New Jersey, Inc. v. Toops*, 507 F. 2d 83 (3rd Cir. 1974). We see no reason to depart from that general rule in the instant case.

Further, in our view, the consent decree itself appears to be a reasonable one, and, contrary to the contention of counsel, does not impose unlawful conditoins.

Judgment affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C 78-0352

TIMOTHY MILONAS, JR., and KENNETH RICE, by and through their Attorney and Guardian Ad Litem, KATHRYN COLLARD, on behalf of themselves and all other similarly situated, PLAINTIFFS,

vs.

JACK L. WILLIAMS, individually and as Owner and Boys Program Director, Provo Canyon School, ROBERT H. CRIST, individually and as Owner and Medical Director, Provo Canyon School, D. EUGENE THORNE, individually and as Executive Director, Provo Canyon School, JOHN F. MCNAMARA, individually and as Administrative Director of the Interstate Compact on Juveniles for the State of Utah, and WALTER D. TALBOT, individually and as Superintendent of Public Instruction, Utah State Board of Education, and their officers, agent, employees and assigns, DEFENDANTS.

JUDGMENT

This matter having been submitted; and the court having previously entered Consent Decrees and Judgments with regard to the defendants John F. McNamara, Administrator of the Interstate Compact on

Juveniles, and Walter D. Talbot, Superintendent of Public Instruction for the State of Utah and the Utah State Board of Education, and having heretofore made and entered its Findings of Fact and Conclusions of Law with respect to plaintiffs' claims for declaratory and injunctive relief against the defendants Williams, Crist and Thorne, and being otherwise fully advised in the premises, the court hereby

ORDERS, ADJUDGES AND DECREES:

1. That defendants Williams, Crist and Thorne are subject to the requirements of Public Law 94-142, Section 504 of the Rehabilitation Act of 1973, and the regulations of the Utah State Board of Education, in providing special education and related services to juveniles at the Provo Canyon School who are funded by public special education funds or who are placed by school districts.

2. That defendants Williams, Crist and Thorne act under color of state law and are therefore subject to the requirements of the Constitution in confining juveniles at the Provo Canyon School for treatment or rehabilitation in conjunction with education. As to juveniles placed by juvenile courts or probation agencies outside the State of Utah, these defendants are also subject to the duly promulgated regulations of the Administrator of the Interstate Compact on Juveniles for Utah.

3. That the following policies and practices of the defendants Williams, Crist and Thorne have violated federally protected statutory rights to receive special education and related services in the least restrictive environment, and the following constitutional rights: Freedom of speech; Due Process, including the right

to receive therapeutic treatment in an appropriate seting; the right to legal counsel; and the right to privacy.

4. That the defendants Williams, Crist and Thorne are hereby permanently restrained and enjoined from subjecting members of the plaintiff class or causing them to be subjected to the following listed policies, practices, treatments or conditions of confinements:

(a) Opening, reading, monitoring or refusing to mail any correspondence from members of the plaintiff class to parents, friends, attorneys or other persons, or in any manner restricting the manner or mode of such communications or the number or type of persons with whom such juveniles may wish to correspond.

(b) Reading, monitoring or refusing to deliver any correspondence mailed by any person outside the Provo Canyon School to any member of the plaintiff class in the Provo Canyon School with the following exceptions. Defendants shall only be permitted to open such correspondence to determine if contraband items are included therein, and to remove such items, if present. In addition, where parents have previously indicated that certain, named individuals outside the Provo Canyon School are not to be permitted to correspond with members of the plaintiff class inside the institution, the school owners may return correspondence from such designated persons to them unopened. However, in no case shall correspondence being sent by members of the plaintiff class to persons outside the institution be opened nor shall defendants refuse to mail such correspodence.

(c) Administration of polygraph examinations to members of the plaintiff class for any purpose whatsoever

(d) The placement of juveniles in the "P room" or isolation facilities for any reason other than to contain a juvenile who is physically violent and dangerous to himself or others, and only for that period of time during which a juvenile remains physically violent and a danger to himself or others.

(e) Use of physical force for any purpose other than: 1) to restrain a juvenile who is physically violent and an immediate danger to himself or others, or 2) to overcome physical resistance, passive or otherwise, to institutional rules, and such force shall be restricted to the least amount reasonably necessary to bring a juvenile under physical restraint or to overcome physical resistance in such circumstances.

5. That the plaintiff class consists of all juveniles residing at the Provo Canyon School, now or in the future.

6. That the remaining practices and policies of the defendants Williams, Crist and Thorne, as these policies and practices presently exist, do not constitute violations of any constitutional rights. Pursuant to the responsibilities of Superintendent Talbot and the State Board of Education under the Consent Decree, the court makes no judgment as to whether remaining practices and policies of the defendants Williams, Crist and Thorne violate State or Federal special education requirements.

7. Defendants Williams, Crist and Thorne are ordered to comply with the duly promulgated orders and regulations of the defendant Utah State Board of Education regarding special education, and are permanently enjoined from receiving State or Federal funds earmarked for special education unless the Provo Can-

yon School is in full compliance with the rules and orders of the Utah State Board of Education and the requirements of the State and Federal special education laws.

8. That this Judgement supersedes the Preliminary Injunction previously entered herein.

9. That plaintiffs are the prevailing parties as far as the class action for declaratory and injunctive relief is concerned and are therefore awarded a reasonable attorneys fee and costs under 42 U.S.C. § 1988, in an amount to be determined.

DATED this 25 day of August, 1980.

BY THE COURT:
BRUCE S. JENKINS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C 78-0352

TIMOTHY MILONAS, JR., and KENNETH RICE, by and through their attorney and Guardian Ad Litem Kathryn Collard, on behalf of themselves and all others similarly situated, PLAINTIFFS,

vs.

JACK L. WILLIAMS, individually and as Owner and

Boys Program Director, Provo Canyon School, ROBERT H. CRIST, individually and as Owner and Medical Director, Provo Canyon School, D. EUGENE THORNE, individually and as Executive Director, Provo Canyon School, JOHN F. MCNAMARA, individually and as Administrative Director of the Interstate Compact on Juveniles for the State of Utah, and WALTER D. TALBOT, individually and as Superintendent of Public Instruction, Utah State Board of Education, and UTAH STATE BOARD OF EDUCATION, and their officers, agents, employees and assigns, DEFENDANTS.

MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case began as four separate but related actions. They are: (1) A 1983 action for damages by plaintiff Milonas; (2) A 1983 action for damages by plaintiff Rice; (3) An action for damages by Plaintiff Class; (4) An action for declaratory and injunctive relief by Plaintiff Class.

As the matter progressed, the *class action for damages* was dismissed without prejudice by the court. Plaintiffs had not complied with Rule 23(c)(2), Federal Rules of Civil Procedure. A number of individuals had sought to intervene as parties plaintiff and defendants had objected thereto even though defendants had prior thereto suggested that class action for damages was not appropriate because the numbers involved were not overly large. The court denied the petition to inter-

vene, and subsequently denied a motion to consolidate when the "petitioners to intervene" subsequently filed a case seeking damages on an individual basis and sought to consolidate. That case currently awaits trial.

The court on the 21st day of February, 1979 after four days of hearings granted a motion for a preliminary injunction and enjoined certain practices of the defendants Thorne, Crist and Williams, the owners and operators of the Provo Cayon School.

What remained for trial on the merits were the two individual damage actions, the class action seeking declaratory relief and permanent injunctive relief against Williams, Crist and Thorne and the class action seeking declaratory relief and injunctive relief against defendants Talbot, the Utah State Board of Education and McNamara, the Interstate Compact Administrator.

Plaintiffs claimed that Williams, Crist and Thorne, owners of the Provo Canyon School, violated their individual civil rights, violated the civil rights of the class members and violated the rights of certain class members to a "special education".

Plaintiffs further claimed that defendants Talbot and McNamara, Utah State public officials, and the State Board of Education had defaulted in carrying out their public responsibilities in overseeing the activities of the Provo Canyon School and asked that each be ordered to do his law mandated duty.

The Provo Canyon School is not just a place for the instruction of secondary school students under 18 years of age. It is not a school in the traditional, ordinary or classic sense. It does offer classes on a secondary level to its resident population, and in most instances does

a good job in its formal teaching. Provo Canyon School is also a correctional and detention facility. Students are restricted to the grounds. Students are confined. Some students are locked in and locked up with varying degrees of personal liberty restored as each progresses through the institutional program. If a student leaves wihout permission, he is hunted down, taken into custody and returned.

Provo Canyon School is also a mental health facility. Adolescent males perceived to have mental health or emotional difficulties or who are chemically dependent persons, are counseled and treated. Adolescent males with forms of learning disability, physical, mental or emotional, are housed, counseled and "taught".

The student population, intermixed and various, is subjected to a form of "behavior modification" described by those who run the school as eclectic. Some of its salient features are isolation from the outside world, little or no communication with the outside world, physical confinement, physical punishment, progressive restoration of liberty, investigation and evaluation of student "attitude" and "truthfulness" and "future conduct" through the use of a machine, and counseling.

While some of the adolescent males are at the school by virtue of placement there by a Juvenile Court after a brush with the law, most of those confined in the institution have never had an independent determination by a disinterested party that they should be confined. The population of the Provo Canyon Schoool is a mix which changes in character from time to time. Some attend and are confined as a result of parental agreement. Some attend and are confined as a result

of an arrangement with a school district. Some attend and are confined as a result of a court mandate. Some attend to avoid state reform school confinement.

Provo Canyon School is also a major business enterprise. A charge of $1,600. per month, per student is made. In 1979, gross revenue totaled $1,857,796.67. Direct or indirect benefits to defendants Williams and Crist for 1978 were in excess of $167,000 each. To a substantial degree the funding for the enterprise to carry out its educational, detention and "therapeutic" activities came from public sources.

Regardless of origin, condition or motivation, once arrived, each person during the beginning phases of the school program was locked in, isolated from the outside world, and whether anti-social, crippled or learning disabled, was subject to mandated physical standing day after day after day to promote "right thinking" and "social conformity". Mail was censored. Visitors were discouraged. Disparaging remarks concerning the institution were prohibited and punished. To "graduate" from confinement to a more liberated phase, one had to "pass" a lie detector test relating to "attitude", "truthfulness" and "future conduct". Some failed to pass and remained in confinement for extended periods of time.

This lawsuit was started by two boys who ran away. They contacted a lawyer and sought the protection of this court. The Chief Judge of this court, upon the agreement of the school, placed the two boys with the Utah State Division of Family Services.

Rice was placed in the Provo Canyon School through the action of the Juvenile Court of the State of Alaska, and was at the school for 7 weeks. Milonas attended

the school as a condition of probation through action of a Juvenile Court of the State of Nevada and was at the school for 3 weeks.

After intensive, stubborn and sometimes acrimonious preparation by the parties lasting in excess of one year, the matter went to trial in each of its three remaining phases on March 24, 1980. The trial lasted 4 weeks.

The issues relating to individual damage claims were tried to a jury.

Concurrently therewith, the issues relating to the class action on whether or not declaratory relief and permanent injunctive relief should be granted to the class were tried to the court.

The jury found no cause of action on the individual damage claims.

During the early stages of the trial to the court, the Utah State Superintendent of Public Instruction, Walter Talbot, and the State Board of Education, having carefully examined their duties under Federal statutory law and Federal regulations, entered into a Consent Decree with Plaintiff Class. The court, pursuant to such agreement, approved and entered such decree. At about the same stage in the trial to the court, John McNamara, the Interstate Compact Administrator, who oversees the placement of juveniles from sister states in programs in this state, having examined his legal duties carefully, entered into a Consent Decree with the Plaintiff Class. Pursuant to such agreement, the court approved and entered such decree.

At the time the court had entered its preliminary injunction against Williams, Crist and Thorne, it had expressed its amazement of the absence of interest on the part of the State of Utah in the student population confined and detained at the Provo institution. Indeed the court had dismissed out the Superintendent of Public Instruction based on representations made at that time. As the matter progressed, facts developed which justified the rejoinder of the Superintendent and resulted further in the Consent Decree heretofor entered.

On May 5, 1980 the court orally issued Findings of Fact, Conclusions of Law and a Permanent Injunction in open court. All parties had repeatedly stated throughout the course of this litigation that what was needed from the court was a prompt and dispositive determination of the issues. Thus it was with these considerations in mind that the court after careful consideration of the facts and the law, felt the need to give a prompt and dispositive ruling from the bench on May 5, realizing that the press of time and the bulk and complexity of the litigation would require final, written Findings, Conclusions and Judgment, as well as this Opinion, all to come after the oral ruling.

The balance of this Opinion will add to the procedural and factual context provided above, will discuss certain post-trial motions filed by the parties and ruled upon at the May 5 hearing, will tie up some loose ends created during the litigation, will discuss the knotty jurisdiction and class action issues raised in this case, and will explain the court's view of the case on the merits.

At the time of the Preliminary Injunction hearing in this case, one thing that greatly concerned the court

was that no state or federal agency exercised general regulatory authority over the school despite the fact that the school was receiving significant amounts of funding to house, treat and educate boys, and despite the fact that the school had almost total control over the lives of the boys during the time that they were confined at the school. The normal program at the school anticipated that a boy would reside there at least for one year, and some boys spent almost all of their high school years at the school.

Plaintiffs initially named as defendants John F. McNamara, who is the Administrator of the Interstate Compact on Juveniles of the State of Utah, Walter D. Talbot, who is the Utah State Superintendent of Public Instruction, and the Utah State Board of Education. Plaintiffs alleged that these defendants had the duty to regulate the school and to monitor the school's conduct in relation to the boys. Prior to the Preliminary Injunction hearing, the court had dismissed claims against defendants Talbot and the State Board of Education, without prejudice. This was based on proffers from these defendants that no boys receiving public special education funds and for whom the state was responsible were at the school, and that absent this funding, these defendants had no duty or authority to regulate the school. Plaintiffs were unable to effectively rebut these proffers at that time, and their initial complaint had not pled a coherent theory of liability as against these two defendants. Claims against defendants from the Utah Department of Social Services were also dismissed.

Although defendant McNamara moved to dismiss at the same time as the other state defendants, his motion was denied. McNamara administers the In-

termountain Compact on Juveniles in Utah, as adopted in Utah Code Annotated, § 55-12-1 et seq. The Compact provided a means of placing minors, adjudicated as delinquent in one state, in another state for treatment or rehabilitation. At the time of the hearing on the Motion to Dismiss there was no question that the school contained a small number of boys placed there for treatment by juvenile courts in other states. However McNamara's position at that time was that these boys had been placed there pursuant to special contracts that did not fall within the terms of the Interstate Compact. The court rejected this contention and basically ruled that all placements at the school from out of state juvenile courts were covered by the Compact. At the time of the Preliminary Injunction hearing, plaintiffs and defendant McNamara reached a settlement as to a Preliminary Injunction under which McNamara would permit no future placements at the school from out-of-state juvenile courts and would see that boys presently placed at the school by out-of-state juvenile courts would be removed and unless or until the Utah State Division of Family Services certified the school as an appropriate placement facility for Utah juvenile courts, the Compact would not permit placements there by out-of-state juvenile courts.

Thus at the time of the Preliminary Injunction hearing, basically the evidence of state action for purposes of civil rights jurisdiction was receipt of significant amounts of public funding by the school, either directly or indirectly, and placement of a very few boys there by juvenile courts. The court expressed on the record its view that the evidence at that time as to state action was "thin". Nevertheless, discovery was just getting underway in the case, and there were numerous un-

answered questions concerning the school's relationship to federal special education laws. Also, there was evidence of school policies or practices that in the court's view clearly violated the civil rights laws, if state action were proved. These included mail censorship beyond inspection for contraband, compelling boys to submit to polygraph examinations at regular intervals, excessive use of isolation facilities at the school and excessive use of physical force.

Because these were the types of practices that threatened imminent and irreparable harm to the boys, and because there was no substantial evidence that the school could not continue to function effectively without these practices, the court preliminarily enjoined these practices based on a "provisional" finding of state action. The court also "provisionally" certified a class consisting of all boys residing at the school during the litigation, again realizing that there were unique class certification problems in the case. However the court could not very well extend protection to some boys and not to others where discovery had not yet revealed the source of funding or placement for most of the boys, and where the only persons available to speak for the boys were parties or witnesses who had run away from the school or who had left in some other fashion.

At the Preliminary Injunction hearing, as well as at trial, the school defendants claimed that the polygraph and the mail censorship were necessary components of security and treatment at the school. However the court believed that the evidence indicated that these practices were gross overreactions to security and treatment needs and unreasonable infringements on basic human and constitutional rights that are possessed by all — even convicted adult felons. The school

defendants also urged that use of physical force and isolation were not excessive because they were only used when students were "out of control". However the term "out of control" as used by the school defendants included everything from physical violence by a boy to a minor infraction of school rules.

Although there was some evidence of actual physical abuse at the school, offered both during the Preliminary Injunction hearing and at trial, these were isolated instances where school employees themselves had lost "control". Abusive actions from "out of control" school employees seemed to be a necessary result of school policies permitting responses out of proportion to behavior that may have been in violation of school rules but was basically innocuous. This was particularly true where the evidence showed that defendant Jack Williams, a director, co-owner and co-founder of the school, was "out of control" on occasion.

Plaintiffs urged, at the Preliminary Injunction hearing and throughout the litigation, that virtually all practices at the school were "anti-therapeutic" and that the school should be closed. This position was not supported by the evidence, even at trial. Some boys perform successfully at the school, and are probably better off for having been there.

On the other hand, for other boys the school is inappropriate and the program could and did lead to tragic results. Although the experts differed about the appropriateness of the school's program as a whole, this is not uncommon. The dispute between the experts is really a dispute between differing philosophies, none of which is entitled to special consideration by the court. There was really no dispute over the fact that the formal educational component of the school is of high quality. No matter how desirable the ends of be-

havior control or modification may be, the Constitution, other federal law, and the fundamental set of generally shared values of our civilization place limits on the *means* used to achieve laudable ends. Lawful ends demand lawful means. Consistency of ends and means is a *must.*

Thus the aim of the court in its preliminary and final orders in this case has been to preserve the valuable aspects of the institution and to restrain only those practices which clearly invade constitutional or federally protected rights.

As discovery developed after the Preliminary Injunction hearing, it became apparent that the initial information possessed by the state concerning the school's role and its own role in federal special education programs was inaccurate. There were and are substantial numbers of boys at the school whose tuition was funded by federal special education programs such as the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.*, which is commonly referred to as Public Law 94-142, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Under these programs a "handicapped" child is basically any child who is difficult to educate in the mainstream of public education. Children so defined range from those with physical impairments, to those who are simply behavior problems in class, to those who may have a complex of physical, mental and emotional problems that interfere with their education in a number of ways. However under federal law, all of these children have the right to be educated in the public schools, or if there is no reasonable way for the public schools to perform their job, to be treated and educated in some other *appropriate* setting at public expense. Receipt by the

Provo Canyon School of such "handicapped" children imposed a set of legal duties on the school, on the placing public school district, and on educational officials of the State of Utah. *See* 45 C.F.R., parts 84 and 121a.

Since it became clear that the Utah State Board of Education was the "state education agency" responsible under Public Law 94-142 for seeing that special education funds to be spent in Utah were allocated to *appropriate* public or private facilities, and for insuring that facilities in Utah receiving such funds were in full compliance with federal regulations, plaintiffs were allowed to bring in the state board and Dr. Talbot as defendants once again. The state's initial misinformation concerning "handicapped" children at the Provo Canyon School and concerning its own responsibility for these children was one indication of the state's default in its duty to regulate the school under federal law.

Even after all of this became clear to the state, the state's acceptance of its special education responsibilities regarding the Provo Canyon School was reluctant. Although prior to trial the State Board of Education finally sent inspectors to the school, they only examined its classroom component. Of course, the educational component received high marks, and had also received high marks from placing school districts that looked *only* at the classroom program. This might have been enough if the facility provided only formal education, but it was grossly deficient when dealing with a residential and detention facility with treatment and correctional programs like those at the Provo Canyon School.

Prior to trial, the State Board of Education and Dr. Talbot filed a Motion for Summary Judgment, as did most of the other parties. One ground for that motion

was that plaintiffs had failed to exhaust administrative remedies under the federal special education laws. However the court fund that administrative remedies were inadequate to deal with the class claims present in this case, and that resort to these remedies would have been futile. The state's position was somewhat incongruous in the face of its initial denial of any responsibility for the children at the Provo Canyon School, and in light of the fact that it was not until the trial of this case that the state agreed to adopt a regulatory mechanism capable of implementing certain remedies provided by federal law, and capable of monitoring compliance by the Provo Canyon School, and other so-called "private" institutions in the state receiving special education funds which are burdened by the duties attached to the receipt and use of such funds. This agreement was embodied in a settlement agreement with plaintiff class that included a Consent Decree basically ordering the state to do what it had a duty to do all along.

Shortly before the trial of this case some confusion developed as to what issues would be tried to a jury, what issues would be tried to the court, and in what order egal and equitable issues would be tried. Since the time of the Preliminary Injunction, the court had assumed and thought the parties had assumed that the "trial" in this case would be a trial to the court on the question of a permanent injunction. The court was aware that damage claims were being asserted by plaintiffs individually, but saw those claims as being collateral to the major thrust of the suit for injunctive relief, and anticipated that the two individual damage claims would be tried subsequent to the injunctive claims. Based on this view of the case, the court had declined to permit the joinder of boys formerly at the school,

or their parents, who wished to assert additional damage claims against the school defendants. Also, when these same individuals filed a separate action in this District to pursue their damage claims (*Horton et al. vs. Williams, et al.*, C 79-723), the court declined to consolidate it with the present action, for the same reason. The court thought that it would be unwieldy to try multiple damage claims to a jury at the same time as injunctive claims were being tried to the court.

Nevertheless, the Pretrial Order finally agreed to by the parties specified that a jury trial would be held and didn't distinguish between a trial of legal and equitable issues. The court frankly overlooked this in signing the Pretrial Order, but at later hearings on February 13, 1980 and March 5, 1980, the court called to the attention of the parties the fact that the Pretrial Order didn't accurately reflect the court's intention to try the equitable issues first in a court trial and to try the damage issues to a jury later, with the possibility that individual damage claims of Milonas and Rice could be consolidated later with the damage action filed by other boys and their parents in C 79-723.

At the time the court initially announced its intentions, defendants made no serious objection to limiting the trial to equitable issues to be decided by the court. Defendants later filed a Motion for Jury Trial on March 11, 1980, relying on cases including *Beacon Theaters v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen v. Wood*, 369 U.S. 469 (1962) for the proposition that not only were defendants entitled to a jury trial on the damage claims, but also defendants were entitled to this jury determination *prior* to the court's determination of equitable issues in order to avoid forfeiture of the Seventh Amendment right to a jury trial by the collateral estoppel effect of a prior court deter-

mination of fact issues common to the legal and equitable claims. The court read defendants' cases and found that their motion was well taken. The court ruled that the damage claims would be tried to a jury and that the equitable claims would be decided by the court in the same proceeding, after the jury had returned the verdict. It made sense to bifurcate the trial only if the bulk of the case, i.e. the injunctive claims, could be tried first.

After the jury trial had commenced, it appeared that both plaintiffs and defendants thought that the so-called "class" damage claims were being tried as well. Although the Pretrial Order referred to damage claims by plaintiffs and class claims by plaintiffs, nothing in the Pretrial Order indicated that the class claims included claims for damages or that there were any claims for damages other than those brought by Milonas and Rice as individuals. More importantly, no notice to the class had been proposed by any party, as required by Federal Rules of Civil Procedure, Rule 23(c)(2). At the earliest practicable time during the trial, the court ruled that the so-called class damage claims were beyond the scope of the litigation, in its existing procedural stance. The court insulated the jury from evidence not relevant to the two individual damage claims by accepting testimony relating only to class injunctive claims out of the presence of the jury.

At the conclusion of the trial on the individual damage claims, the jury's Special Verdicts answered "no" to the following questions as to each of the claims by plaintiffs Milonas and Rice against defendants Williams and Crist:

Was the plaintiff [Timothy Milonas, Jr. or Kenneth Rice] deprived of any of the Federal Constitutional

rights specified below, as the proximate result of the knowing acts of defendant [Jack L. Williams or Robert H. Crist]?

[Six such rights were specified, including "freedom of religion", "freedom of speech", "due process of law", "legal counsel", "privacy" and "therapeutic treatment".]

The damage claims against defendant Thorne had been dismissed by the court prior to submitting the case to the jury. Dr. Thorne became Executive Director of the school after the litigation was commenced and there was no evidence tying him to school policies and practices in his previous role as "consultant" to the school.

The court had also directed a finding as a matter of law that defendants Williams and Crist had acted under color of state law with respect to plaintiffs Milonas and Rice. There was no dispute about the facts that gave rise to this determination by the court. Rice had been placed at the school by an Alaskan juvenile court after an adjudication of his delinquency. Although Milonas was placed by his mother, Mrs. Stout, this placement was a condition of probation imposed by a Nevada juvenile court. Defendants' Exhibits 8L and 8M, admitted into evidence, shed much light on the relationship between the school and these two juvenile courts, as does plaintiffs' Exhibit 88.

In opposing a court finding of state action as a matter of law, defendants Williams and Crist relied on cases indicating that even where state courts or agencies had placed juveniles in private residential or treatment facilities, the "nexus" required for a finding of state action was absent unless direct state participa-

tion in alleged constitutional violations occurring after placement was shown. *See, Henig v. Odorioso*, 385 F. 2d 491 (3d Cir. 1967); *Campbell v. Glenwood Hills Hospital, Inc.*, 224 F. Supp. 27 (D. Minn. 1963).

With respect to Milonas and Rice, the authority and duty of the juvenile courts to control the treatment of each boy did not end with mere placement at the school. The Alaskan court executed forms consenting to limited monitoring of Rice's mail and the use of the polygraph on him. The Nevada juvenile judge was listed as a legal guardian and supervisor of the placement at the Provo Canyon School, in the Milonas application for admission to the school. Correspondence contained in the above-reference exhibits showed that the treatment of both Milonas and Rice after placement at the school was subject to the direct control of the Nevada and Alaska juvenile courts, that these courts were fully aware of policies and practices at the school, and that these courts had the power to eliminate the subjection of the two boys to any school policy or practice, or to remove the boys from the school. Thus the "nexus" missing from the above-cited cases was present regarding Milonas and Rice. *See, Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974); *sub nom, Duchesne v. Sugarman*, 566 F. 2d 817 (2d Cir. 1977) and *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979).

If state action is not present with regards to the Provo Canyon School's treatment of Milonas and Rice, this court cannot envision a situation where any "private activity" falls under the civil rights laws, no matter how direct and pervasive the state involvement is in the activity complained of. The power of the state was used to place these two boys in the Provo Canyon School, to knowingly subject them to school policies and practices, and to keep them there against their will, to

the same extent as if the courts had placed the boys in a "public" treatment, correctional or detention facility. This was perhaps shown most vividly at a hearing in which counsel for Mrs. Stout informed the court that a bench warrant for the arrest of the Milonas boy had been issued by the Nevada juvenile court, because the boy had left the school. At least one or perhaps both of these boys were subject to the Interstate Compact on Juveniles. Defendant McNamara had not performed his duties with respect to either, and given his later position regarding placements from out of state juvenile courts, these boys should not have been placed in the school at all. The court's subject matter jurisdiction over the class injunctive claims will be dealt with in more detail below.

After the verdict on the two individual damage claims, plaintiffs moved for Judgment Notwithstanding the Verdict and the school defendants moved for Judgment on the Verdict. The school defendants also moved to dismiss the class injunctive claims based on the jury's findings on the individual damage claims, the court's dismissal of the class damage claims, the newly found regulatory authority of the state, and "voluntary" changes in school policies and practices since this litigation commenced.

As to the cross-motions on the verdict, the court ruled that when the evidence is viewed in the light most favorable to defendants, the verdict must stand. Had the verdict contained a clear finding that practices restrained by the Preliminary Injunction did not violate constitutional rights, the court would have set aside that finding as being clearly erroneous. However as the Special Verdict form quoted above shows, the basis for the verdict of no cause of action could have been any one of several grounds. For example, there was

evidence that would support a finding that any injury suffered did not "proximately" result from defendants' "knowing" policy or practice, that the boys were not subjected to certain school practices, or that any injury suffered did not rise to the level of a constitutional violation in light of the short time the two boys were at the school.

However it also appears that the jury verdict did not resolve any fact issues that are common to the equitable injunctive claims tried to the court. In their post-trial Motion to Dismiss the injunctive claims, defendants cite cases for the proposition that where the jury makes findings on fact issues common to both legal and equitable claims in the same action, the jury's findings on the legal claims bind the court's findings on the equitable claims. *See, Eli Lilly v. Generix Drug Sales*, 460 F. 2d 1096 (5th Cir. 1972) and *Jones v. Schramm*, 436 F. 2d 899 (D.C. Cir. 1970). The court has also done some research in this area, which has revealed that there are few cases on this precise issue, and some cases appear to have held contrary to the cases relied on by defendants. *See, Wright v. U. S.*, 472 F. Supp. 1153 (D. Mont. 1979). Nevertheless the court generally agress with defendants' position as to the proposition. Their problem here, however, is that the jury's verdict resolves none of the issues included in the equitable claims before the court, and was made on an evidentiary base drastically smaller — indeed different from the evidentiary base considered by the court in dealing with the class injunctive claims. For example, neither Milonas nor Rice were funded or protected by federal special education laws, as are other boys within the class. Boys within the class were subjected to school practices other than those to which Milonas and Rice were subjected. Many boys had been at

the school much longer than Milonas and Rice and as a result suffered grevious loss of constitutional or other federal rights. Although some of the above differences between the individual damage claims and the class injunctive claims call into question the status of Milonas and Rice as class "representatives", these and other class certification issues will be discussed more fully below.

Throughout the trial the court asked all parties to submit a list of precise fact issues common to the legal and equitable claims. The parties were unable to do so.

The form of the Special Verdict was primarily within the discretion of the court. *See, Midwestern Wholesale Drug, Inc. v. Gas Service Co.*, 442 F. 2d 663 (10th Cir. 1971). The only objection to the Special Verdict form was, in the court's view, untimely, and did not relate to presentation of common fact issues to the jury. A form of Verdict any more detailed than the one given would have been unduly confusing, especially in light of the detailed Instructions requested by the parties and given by the court. In sum, the Verdict found by the jury was irrelevant to the injunctive claims confronting the court.

The school defendants also argued that the state's agreement to regulate special education and juvenile court placements at the school makes a Permanent Injunction unnecessary. This ignores the fact that the state's agreements specifically called for, among other things, rules that would conform to the court's Permanent Injunction. Also the school defendants now appear to contest the newly found regulatory authority of the state, although previously they indicated such authority would be "welcome".

Even though the court found that the practices and policies permanently enjoined violated both civil rights and special education laws, the court makes no finding as to whether other school policies and practices violate special education laws. Instead the court has ordered the school defendants to comply with rules to be adopted by the Utah State Board of Education under its settlement with plaintiffs, and has enjoined the school from receiving public special education funds if not in full compliance with the requirements of the special education laws. This is a unique and specialized area of the law, requiring the expertise of state education officials, which is why the appropriate state officials, not this court, will carry the burden of insuring future compliance with special education laws by the Provo Canyon School, as well as by other comparable facilities in the state.

The school defendants also argued that "voluntary" changes in school programs made a Permanent Injunction unnecessary. Although the court understands and welcomes the real changes that have occurred at the school, the abandonment of the polygraph and modification of mail monitoring came only pursuant to court order, and the record indicates that these practices would return in some fashion absent court order. The court also sees some of the changes as being cosmetic.

Among the loose ends in this litigation referred to above include questions regarding the guardian ad litem status of plaintiffs' counsel, Kathryn Collard, the question of possible "indispensable" parties to this litigation, and the question of statute of limitations. Although the court has had occasion to make rulings concerning these questions during the course of this liti-

gation, these are questions that appear to have been preserved in the Pretrial Order and deserve fuller exposition here.

At the time Ms. Collard filed this action and sought emergency relief from Chief Judge Anderson, she concurrently filed a motion for her appointment as guardian ad litem for the two named plaintiffs. The record does not indicate that Judge Anderson took any action on this motion, and after this case was reassigned to this judge, the motion was not renewed until quite late in the litigation. When Judge Anderson ordered that the named plaintiffs be placed with the State Division of Family Services, he did so with the agreement of the school defendants, and the record does not indicate that any objection to Ms. Collard's appointment was made at that time. Although from time to time during the litigation the school defendants and others have collaterally attacked counsel's lack of status as guardian ad litem, no competing motion for appointment was ever filed.

When counsel's motion for appointment was renewed late in the litigation, defendants objected on the grounds that Utah Rules of Civil Procedure, Rule 17(c) required that the motion for appointment be made by the boys themselves because they were over 14 years old, and that counsel had a conflict of interest because she was serving as a volunteer attorney for the American Civil Liberties Union. The court did not find defendants' objections well-taken and granted the appointment as to the two named plaintiffs. It appeared that counsel had in fact acted on behalf of the two boys as well as herself in seeking the appointment. The filing and pursuing of this action, as well as the removal of the boys from the school, was pursuant to the request or desire of the boys themselves, rather than

in conflict with their requests or desires. All of this was confirmed later by testimony from the two boys at trial. Although the parents or general guardians might have been appropriate guardians ad litem in other circumstances, the real conflict of interest here was between the boys and their parents or general guardians. The parents or general guardians had expressly consented to school practices that the boys themselves felt were illegal, or at least wrong. Ms. Collard was an appropriate guardian ad litem under the circumstances.

During the course of the litigation, the school defendants urged that parents, juvenile court officials, officials from school districts that had placed boys at the Provo Canyon School, etc., needed to be joined as indispensable parties under Federal Rules of Civil Procedure, Rule 19. At one point these defendants urged the court to give notice of this action to all parents. The court felt that neither of these steps was necessary to award meaningful relief among the existing parties, or to avoid prejudice to non-parties. The school's position throughout has been that it stands in *loco parentis* to the boys at the school. In denying defendants' motion for the court to notify parents, the court indicated that the school was free to notify parents if it wished, and the record indicates that the parents were notified, particularly concerning plaintiffs' desire to discover school records on each boy at the school. Certain parents moved to intervene in this action and for the most part those motions were granted. Other non-parties apparently chose not to intervene. The court's orders throughout this case have been designed to protect the interests of parties and non-parties alike. The court has been able to fashion adequate relief based on the existing parties to this suit.

The school defendants have urged that the one year statute of limitations found in *Utah Code Annotated* § 78-12-29 applies to this action. Assuming, without deciding, that this is true, the practices that the court has enjoined were continuing at the time this action was filed, or had occurred within one year prior to that time and were likely to recur unless enjoined. These defendants also urged that the one year statute of limitations bars consideration of events occurring prior to September of 1977. To the extent that the court has served as factfinder on the equitable claims, a certain amount of historical information about the school has been useful to the court in gaining some perspective. Also, the use of evidence as to historical practices at the school really raises evidentiary questions of relevance and probity rather than statute of limitations issues. To the extent that the court has considered historical evidence, it has considered remoteness in time, as well as other appropriate factors, in determining the relevance or probity of such evidence.

In assessing both the subject matter jurisdiction of the court and the nature of the class to be certified for purposes of injunctive relief, it is useful to look at sources of placement and funding for boys at the school. Plaintiffs' Exhibits 111 through 150 and defendants' Exhibits 5L through 5R are helpful here. The school had an average attendance of approximately 110 boys in 1979. During 1979, 75 boys received some form of public funding. (See defendants' Exhibit 5L.) Of these 75, all but about seven boys received funding for special education under Public Law 94-142 from some 44 school districts throughout the country, including 33 school districts in California, three school districts in Utah, two school districts each in South Dakota and

the state of Washington, and one district each in Idaho, Minnesota, New York and Wyoming.

Defendants' Exhibit 5M shows that 77 boys received public funding in 1978. The average school population during that year was about 120 boys. Of the 77 publicly funded boys in 1978, more were funded as a result of juvenile court placements and fewer as a result of school district special education placements than in 1979. From 1973 onward, defendants' Exhibits 5L through 5R show a steady increase in the per cent of school revenues received from public sources, reaching a high of 33% in 1979.

The evidence discussed above in relation to juvenile court knowledge of and consent to school policies and practices regarding Milonas and Rice typifies the state activity involved in the juvenile court placements generally. *See*, plaintiffs' Exhibit 88. State juvenile court judges and probation officers knew about and consented to the use of the polygraph, and knew or should have known that each boy had to "pass" a polygraph examination before he could advance within the school program, before he was able to obtain certain rights or privileges from the school, and before he could leave the school either temporarily or permanently. As to mail monitoring, the Alaskan juvenile courts apparently exempted communications to and from attorneys, probation officers and others from the general school policy, although it is not clear whether other juvenile courts did likewise. Besides Alaska, boys were placed from juvenile courts in at least the states of Arizona, California and Indiana.

Much more important than the 20 or so juvenile court placements are the dozens of school district special education placements shown above, and the steady

increase in those placements to a high of 68 in 1979. These placements create alternative grounds for this court's subject matter jurisdiction. These placements establish "state action" for purposes of civil rights jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, as well as federal question jurisdiction under 28 U.S.C. § 1331 for causes of action based upon federal special education laws themselves, 20 U.S.C. § 1401 *et seq.* and 29 U.S.C. § 794. A brief review of the applicable federal regulations and the pertinent evidence shows the "nexus" between "state action" and the plaintiffs' causes of action against the Provo Canyon School as well as the jurisdictional base for claims under the special education laws.

First of all, the publicly funded special education placements were *not* made by parents; they were made by school districts. *See* plaintiffs' Exhibit 14-O. The placements were made by written contracts between the school districts and the Provo Canyon School, and included reimbursement for "counselling and guidance" at the school. *See* plaintiffs' Exhibits 132 and 133. The reason these placements and contracts were made by the school districts rather than the parents is because these school districts were attempting to perform their federally mandated duty to provide "special education" to those children they had been unable to educate in their regular public school systems. *See*, 45 C.F.R. Parts 84 and 121a. Although the "public function" state action analysis is rarely applicable, this case is one instance where it does apply since it is clear that the privately owned facilities of the Provo Canyon School were used by the school districts to meet their federal duty to give a "free and appropriate public education" to handicapped children. *See*, plaintiffs' Exhibit 143.

If a public school district elects to perform its duties through referral to privately owned residential and detention facilities, such as the Provo Canyon School, it is responsible for insuring that the private facility meets all of the requirements applicable to public facilities providing similar services. 45 C.F.R. § § 84.33(b)(3) & 121a.2(c). Among the services that must be provided, and that must be state regulated, are "non-academic" services including guidance, counselling, therapy and the like. 45 C.F.R. § § 84.37 and 121a.306. These services must be provided in the least restrictive program appropriate for the child and the least restrictive appropriate environment within that program. 45 C.F.R. § § 121a.550 through 556. In selecting the least restrictive alternative, possible harmful effects to the child from a particular program must be considered. 45 C.F.R. § 121a.552(d). All details of the particular program chosen for a child, whether in a public or private facility, must be reflected in an Individual Education Plan (IEP) in which the school district or state education agency must participate and which the state must enforce. 45 C.F.R. § 121a.341. The state must also participate in any changes in the IEP. 45 C.F.R. § 121a.347(b). The Provo Canyon School sent periodic progress reports as required by law, to placing school districts. *See*, plaintiffs' Exhibit 121.

Despite the fact that the Provo Canyon School maintains that its polygraph, mail monitoring and isolation practices are not just for security purposes but are an integral part of treatment or therapy at the school, despite the fact that therapy is one of the non-academic services that must be part of the IEP, and despite the fact that the school districts are responsible for seeing that such services are provided in the least restrictive

appropriate environment, the IEP's for the boys at the school did not mention these school practices. *See*, plaintiffs' Exhibit 161. Of course these practices had been stopped by the Preliminary Injunction when the state certified the Provo Canyon School as in compliance with P.L. 84-142 in December, 1979. *See*, defendants' Exhibit 5V. The Consent Decree later agreed to by the Utah State Board of Education effectively repudiates this certification. Similar certifications from other states also overlooked school practices that these states had a duty to control or eliminate.

The federal special education regulations require not only that individual placements at private schools must be regulated and monitored by the placing school district, but also that the state within which school district private placements are made must regulate and monitor the private *programs* that provide special education and required services such as residential care and therapy. 45 C.F.R. § 121a.600. Also, 45 C.F.R. Subpart D *makes regulations for public school special education programs also applicable to private schools that accept school district placements or funding, and makes the states responsible for enforcement.* If the private school programs don't comply with applicable state and federal regulations, the school district or state education agency is faced with the choice of either bringing about a change in the private program or withdrawing placements and funding. Similarly, the Provo Canyon School is faced with a choice of either bringing its programs into compliance with the special education laws or refusing school district placements and funding. However once the school accepts school district placements and funding, and so long as it continues to accept them, it is jointly responsible for the performance of special education duties imposed

on the state by federal law, and jointly liable under federal law for the breach of those duties.

Because the states, including the State of Utah, and the Provo Canyon School had not lived up to their joint responsibilities under federal law, this court was also faced with a choice between either fashioning modest injunctive relief to compel both the state and private participants in the federal special education program to meet these responsibilities, or ordering the removal from the school of all boys placed or funded by school districts. This latter alternative would likely cripple the school financially, and lead to the closure of the school sought by plaintiffs. This latter alternative is also the necessary result if the court were to accept defendants' argument that the court may not enforce the federal special education regulations by modifying the practices of the private school program to which the regulations apply.

The foregoing is but a sample of the evidence of joint participation by school districts, state education agencies, juvenile courts and the Provo Canyon School in the practices complained of by plaintiff. At any given time since this litigation began, over one half of the boys at the Provo Canyon School had been confined there by the authority of state courts or school districts, for purposes of therapy and rehabilitation in conjunction with education. State powers and duties were delegated to or shared with the Provo Canyon School, so that regardless of what test is applied, there can be no doubt that the school acted "under color of state law" in subjecting these boys to practices that the school alleges are a part of the therapy and rehabilitation programs justifying state placements.

Abuse of state authority by the school, or use of state authority in a manner not reasonably related to purposes for which that authority was granted or shared gives this court jurisdiction to remedy such abuse of state power. This jurisdiction covers both the private institution that has assumed state powers or duties and the state entity charged with the supervision of that private exercise of state powers and duties. If the Constitution prevents the states from using the polygraph, prohibits mail censorship, precludes isolation and physical force in the manner practiced at the Provo Canyon School, then it similarly bars the school itself, where the school is engaging in such practices pursuant to state powers and duties to treat and rehabilitate delinquent and handicapped children. This is the Provo Canyon School's *quid pro quo* for the substantial funding it receives in payment for school district and juvenile court placements.

"State action" so permeates and is so intertwined with every aspect of the operation of the program at the Provo Canyon School, that the school's program as a whole operates "under color of state law," giving this court jurisdiction to issue orders protecting even the minority of boys who have not been placed there by state action. An example of this intertwining of state and private action is found by looking again at the federal special education regulations implementing P.L. 94-142. Although most of these regulations are tied to school district placements or receipt of public funding, 45 C.F.R. § § 121a.451 through 460 specifically require the state education agency to offer regulated special education services for handicapped children in private schools within the state's borders, even where these children are not placed or funded by a public school district. Thus the federal law establishes

that handicapped children in private facilities have a state regulated right to some of the benefits of a "free and appropriate public education," even absent placement by public school districts or application by parents for the "free" public funding.

This is especially noteworthy in light of evidence that there are substantial numbers of children at the Provo Canyon School who are "handicapped" within the meaning of P.L. 94-142 but were not placed or funded by any school district or state agency. For example, in 1978 only 50-60 boys at the school had been placed by school districts, yet the Provo Canyon School itself estimated that 110 of 125 boys at the school on February 1, 1978 were "educationally handicapped". *See*, plaintiffs' Exhibit 141. Also, both Rice and Milonas had been diagnosed as "learning disabled", despite the fact that neither was funded under P.L. 94-142. *See*, defendants' Exhibits 8L and 8M.

The Provo Canyon School's capacity to exercise state special education powers and perform state and district duties is a significant selling point in recruiting students from public and private sources. The school uses such capacity extensively in its advertising. *See*, plaintiffs' Exhibits 2 and 3 from Preliminary Injunction hearing. The school encourages parents to place children at the school privately, and then to apply to their school districts for special education funding, which may or may not be forthcoming. *See*, plaintiffs' Exhibit 2 from the Preliminary Injunction hearing. The lure of public funding is almost overwhelming for most of these parents, and this lure results in private placements at the school, regardless of whether the public funding ever materializes.

Finally, if there was ever any doubt that plaintiffs could include claims of violations of federal special education laws in their civil rights cause of action, that doubt was removed by *Maine v. Thiboutot*, 48 U.S.L.W. 4859 (U.S. Supreme Court, No. 79-838, June 25, 1980).

Turning to federal question jurisdiction under 28 U.S.C. § 1331 for causes of action directly under P.L. 94-142 and Section 504 of the Rehabilitation Act, defendants dispute that such causes of action against private defendants are contemplated by these federal laws, even as to injunctive relief. Although the law is mixed and still developing as to whether a damage cause of action may be maintained against either a public or private defendant, the federal courts have almost uniformly permitted injunctive causes of action under federal special education laws against public defendants, where state administrative remedies have been exhausted or are futile. *See, Miener v. Missouri*, 48 U.S.L.W. 2522 (E.D. Mo. January 25, 1980); *Patton v. Dumpson*, 48 U.S.L.W. 2523 (S.D.N.Y. January 23, 1980); and *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979). The court has previously stated its finding herein that state administrative remedies were inappropriate for the class claims in this case, and that Utah administrative remedies that could be applied to the Provo Canyon School were virtually non-existent until the conclusion of this litigation.

If a cause of action for injunctive relief may be stated against public defendants under federal special education laws, then one may be stated against private joint participants who share federal special education duties and responsibilities. This is especially true in this case, where the public defendants had abrogated their responsibilities to control their private

delegatees, leaving the court with a choice between either exercising that control itself, or excluding the Provo Canyon School from participation in the federal special education programs, once that participation became known.

Finally, the court finds that the value of the federal special education rights possessed by each child to whom those rights apply exceeds the $10,000. amount in controversy required under 28 U.S.C. § 1331, such amount being slightly over 1/2 of the yearly tuition charged for each boy at the Provo Canyon School, in return for providing special education.

Regarding class certification and representation for purposes of injunctive relief, at the time of the Preliminary Injunction, this court provisionally certified a class consisting of all boys residing at the Provo Canyon School during the course of this litigation. As a final ruling, this court is certifying a class consisting of all boys residing at the school now and in the future. The court has found that all of the required elements under Federal Rules of Civil Procedure, Rule 23(a) and (b)(2) are met, even though defendants argue that none are met. The court never certified a class, either provisionally or otherwise, for purposes of a class damage claim under Rule 23(b)(3) and (c)(2), and any such claim was dismissed without prejudice at trial, based upon lack of the notice to the class required by Rule 23(c)(2).

Both at the Preliminary Injunction and at trial, defendants argued that since both of the named plaintiffs acting as class representatives had left the school, their individual claims for injunctive relief were moot and there was no standing to assert injunctive claims

on behalf of a class of boys still at the school. In *U.S. Parole Commission v. Geraghty,* 26 Criminal Law Reporter 3139 (U.S. Supreme Court No. 78-572, March 19, 1980), the Supreme Court held that where a class representative has a ripe claim for injunctive relief at the time he applies for class certification; class certification is denied by the District Court; and the representative's injunctive claims subsequently become moot, reversal on appeal of the denial of class certification allows the class claims to be litigated despite the mootness of the representative's individual claims. The court ruled that the class representative retained a personal stake in the class certification issue, despite the mootness of the individual claim for substantive relief. The court believes that the facts of this case fall within *Geraghty* or within a necessary extension of *Geraghty.*

At the time the Complaint in this litigation was filed, the two named plaintiffs were either at the school or subject to the custody and control of the school, and thus had ripe claims for injunctive relief, as well as a claim for class certification contained in the Complaint. However the named plaintiffs contended that as a result of the filing of this suit they were subject to imminent and irreparable harm from the school. Judge Anderson then removed the two boys from school custody based upon this contention and upon the school's agreement. However even after these boys left the school, through counsel they continued to vigorously press for class certification, which continued to be a concrete, sharply presented issue. Since the court's initial class certification was provisional only, and expressly subject to redetermination, the named plaintiffs continued to seek final certification, and final certification remained a concrete and contested

issue until the court ruled on the merits from the bench on May 5, 1980. The court thus believes that *Geraghty* permits the class injunctive claims to be litigated, despite the mootness of the individual damage claims of the named representatives, given the foregoing fact pattern.

Even if *Geraghty* doesn't directly control this situation, the court believes there are other compelling reasons for permitting the class injunctive claims to be litigated. As a practical matter, no class representative could litigate the injunctive claims in this lawsuit while continuing to reside at the school. The admittedly authoritarian regime at the school could not tolerate the open rebellion such litigation represents, and the threat of retaliation from the school could not be avoided. Furthermore, the school defendants have the power to moot any individual claim for injunctive relief simply by discharging the claimant from the school. The boys at the Provo Canyon School needed someone to speak out on their behalf; school policies and practices effectively muted their own voices; and given the abrogation of state oversight responsibilities, the only persons who could speak for the boys were other boys who had left or who were about to leave the school.

As to the numerosity requirement of Rule 23(a), although the number of boys at the school at any given time was not so great as to make individual joinder impossible, boys whose time at the school had ended were continually being discharged and new boys were continually being accepted by the school. Thus the fluid nature of the school population, rather than the actual number of boys, would make joinder unmanageable.

Regarding issues of fact or law common to the class, defendants contend that because each boy comes to the

school with individual problems and therefore receives individualized treatment from the school, there are no such common issues. The evidence does not support this position. Until the Preliminary Injunction, each boy at the school, regardless of the source of his placement or problems, was subject to each of the practices that the court enjoined. Plaintiffs initially sought to have classes and sub-classes certified only as to boys who had been placed at the school by direct state action. However based on the court's finding that state action is intertwined with all aspects of the school program, based on the evidence that all but a handful of boys at the school are "handicapped" within the meaning of the federal special education laws, based on the fact that all boys at the school are entitled to some form of appropriate treatment, and based upon the uniform application of many school practices, the appropriate class consists of all boys at the school, now and in the future. The common claims clearly outweigh individual differences between class members and differences between class members and class representatives.

In light of the court's analysis of the mootness issue, the claims of the named plaintiffs are typical, though not identical with, the class claims. Although neither named plaintiff was placed or funded pursuant to special education laws, each was diagnosed as "learning disabled". Also, the Milonas boy was placed and funded by his parent, even though the parental placement was a condition of his juvenile court probation. The Rice boy was directly placed by a juvenile court and was state funded. It is not necessary, and would be impossible, to have class representatives for each identifiable interest within the class.

The named plaintiffs have fairly represented the interest of the class. Although there may be a conflict

of interest between class members and their parents or the school, the court perceives no conflict between class members and their named representatives. The class representatives were not called upon to represent the interests of parents or the school.

Finally, under Rule 23 (b) (2), the school defendants have acted on grounds generally applicable to the class. Specifically, the school's position has been that, regardless of the source of placement or funding of a boy, the school has the right to subject him to practices this court has enjoined, all in the name of therapy and rehabilitation, as well as for security purposes. The school's position has also been that its practices are justifed because it stands *in loco parentis* regarding each boy at the school.

Defendants have relief on *Parham v. J. L.*, 47 U.S. L.W. 4740 (U.S. Supreme Court No. 75-1690, June 20, 1979) and *Bell v. Wolfish*, 441 U.S. 520 (1970) as setting standards that apply to the merits of this case. *Parham* involved a challenge to Georgia's procedures for "voluntary" commitment of juveniles to state mental hospitals by their parents. Like the case at hand, although "voluntary" for the parents, the commitments were "involuntary" as far as the plaintiff children were concerned. These plaintiffs contended that due process required a formal, adversary hearing before the commitments could occur. However the Supreme Court held that existing Georgia procedures were adequate because due process required only that an informal medical determination be made by a "neutral factfinder", such as an admitting physician, that a child is medically ill and in need of treatment. The court applied the balancing test used in virtually all procedural due process cases. Although the court recog-

nized that these children had constitutionally protected liberty interests, and that those interests might conflict with the interests of the parents in some instances, the court recognized the rebuttable presumption that parents will act in the best interests of their children, held that parents have a large amount of discretion in pursuing those interests, and held that the independent medical determination was a sufficient check on parental discretion. The court also held that where the state served as a guardian *in loco parentis* to these children, the same presumptions and considerations applied to the due process requirements for initial commitment as in the case where natural parents sought the commitment.

Bell was an attack on the conditions of confinement by adult pre-trial detainees at a federal jail. The lower courts held that certain jail practices and conditions were unconstitutional because not justified by "compelling necessities" of jail administration or security. The Supreme Court held that this was not the proper standard. Due Process under the Fifth Amendment required only that practices and conditions be "reasonably related" to legitimate purposes for confinement or to legitimate administrative or security interests. Because the pre-trial detainees had not been adjudged guilty of any crime, punishment was not a legitimate state purpose, and the cruel and unusual punishment standards of the Eighth Amendment did not apply. The court found that the conditions and practices under attack were reasonably related to legitimate security and administrative needs, and therefore were not punitive.

The court agrees with defendants that the general standards enunciated in *Bell* apply to the case at hand. None of the juveniles at the Provo Canyon School have

been adjudged guilty of crimes by adult courts, although some have been adjudged delinquent by juvenile courts. Others have been determined to be handicapped by their school districts. All boys at the school have been found to be in need of education, plus some sort of treatment, therapy or rehabilitation, even where that finding has been made only by the parents and private physicians or counsellors. Thus the Eighth Amendment cruel and unusual punishment standards don't apply. Fifth and Fourteenth Amendments due process standards do apply, given the court's findings as to state action, and the practices at issue in this case are permissible only if reasonably related to legitimate purposes of confinement, or to legitimate school security or administrative needs.

Of course the juveniles at the Provo Canyon School are not pre-trial detainees confined only for the purpose of assuring their presence at trial, and so the legitimate purposes for confinement and the interests of the juveniles confined are different than in *Bell.* Juveniles placed at the Provo Canyon School by juvenile courts have been adjudged delinquent according to due process standards significantly less strict than those that must be applied to adult criminal defendants. The justification for this is that adjudged juvenile delinquents may not be incarcerated for punishment, but may only be confined for purposes of treatment and rehabilitation. This court recognizes a "right to treatment" for these boys in light of the duty to provide treatment that must be imposed upon juvenile courts as the *quid pro quo* for relaxed procedural due process requirements. In light of *Bell,* the court does not believe that the Constitution requires that treatment for adjudged juvenile delinquents must be provided in the "least restrictive" alternative, but only

that such treatment must be reasonably related to the juvenile's treatment needs, and must not be unreasonably restrictive.

Juveniles placed at the Provo Canyon School pursuant to federal special education laws do have a federally protected right to the least restrictive form of appropriate treatment. 45 C.F.R. § § 121a.550 through 556.

As to juveniles confined at the Provo Canyon School by or with the consent of parents or guardians, defendants argue that under *Parham*, such parental consent places the school itself *in loco parentis*, and immunizes school practices from scrutiny, so long as these practices do not constitute child abuse. To bolster their argument defendants point out that the school has obtained express parental consent to specific practices such as mail montoring and the use of the polygraph. The court does not agree with this analysis of the application of *Parham*.

Parham was not concerned with conditions of confinement; it was concerned with procedures by which confinement may occur. In the case at hand, the procedures by which children were placed at the Provo Canyon School are not under attack; rather the conditions of confinement are at issue. However *Parham* did hold that where confinement is to occur at a state facility, even the "voluntary" or private placement by parents was subject to procedural scrutiny under the Due Process Clause of the Constitution. It also held that the placement decision was not subject only to the unbridled discretion of the parents, but was limited by the requirement of an independent medical determination of mental illness and need for confinement.

The court has found that state action is so intertwined with all aspects of the operation of the Provo Canyon School that the school as a whole operates under color of state law. Thus, as in *Parham*, even "voluntary" parental decisions or parental consent are subject to constitutional scrutiny, where such decisions or consent will result in confinement or significant loss of liberty for a child, and where confinement or loss of liberty occurs at a facility operating under color of state law, such as the Provo Canyon School. Where such parental decisions or consent relate to conditions of confinement, *Bell* provides the applicable constitutional standards. The conditions of confinement must be reasonably related to legitimate purposes of confinement or to legitimate security and administrative needs of the confining facility, and may not be unreasonably restrictive in light of those legitimate purposes and needs. The legitimate purposes for confinement at the Provo Canyon School are residential treatment, therapy or rehabilitation, in conjunction with education. Although there may be many treatment alternatives that are reasonable and not unnecessarily restrictive, and the parent has virtually unlimited discretion to choose between those legitimate alternatives, parental consent does not legitimize conditions of confinement that are not reasonably related to treatment needs or that are unreasonably restrictive in light of bona fide security or administrative needs.

Before discussing this analysis in light of specific practices at the Provo Canyon School that have been enjoined, the court should note its view that if there is conflict between legitimate treatment needs on the one hand and legitimate administrative and security needs on the other, the treatment needs dominate, in

light of the use of treatment, rehabilitation and parental consent as justifications for limiting the procedural due process protection afforded to juveniles.

The court has found that practices at the Provo Canyon School regarding use of the polygraph, mail monitoring, isolation and physical force are not reasonably related to legitimate treatment needs, are unreasonably restrictive in light of legitimate school security and administrative interests and are therefore unconstitutional. *A fortiori,* these practices also violate the right to the least restrictive treatment alternative under the federal special education laws. As to the remainder of the 13 practices contested by plaintiffs, the court has found that these reasonably relate to legitimate treatment and security purposes, are not unreasonably restrictive, and are therefore constitutionally permissible. However the court expresses no opinion as to whether or not these remaining practices violate rights to the least restrictive alternative or other rights under the federal special education laws. The State of Utah, among others, will need to make that determination in th first instance, under its newly found regulatory authority.

As to the polygraph, the court has difficulty envisioning a set of facts that would justify use of the polygraph on juveniles, either in the name of "therapy" or for security. That set of facts certainly did not exist at the Provo Canyon School. Although there was some evidence offered in support of justification, and some evidence of "voluntary" use of the polygraph by boys, this device is inherently coercive and represents the most serious intrusion into the very thought processes of an individual. It was certainly used in a coercive manner at the Provo Canyon School. Refusal to take the polygraph resulted in punishment hours that boys

had to stand or sit off and meant that a boy could not advance within the school program and could not leave the school. Boys were subject to punishment not only for what the polygraph revealed they had done, but also for what the polygraph showed they had *thought* about doing. Until this court's Preliminary Injunction, *all* boys at the school were subject to the same polygraph policies, even those placed exclusively for special education and those with no record of juvenile offenses.

The school also used the polygraph to prevent the flow of any negative information about the school. Boys entered into agreements and even formal contracts with the school to obey the rules and to avoid "negative thinking", which included saying bad things about the school. The polygraph was used to test performance of these agreements or contracts. Boys even had to agree that after they left they would not say bad things about the school, and boys knew that any *intention* to violate that agreement would be revealed by the polygraph, and would prevent or delay their departure. *See* plaintiffs' Exhibit 74, (Control No. 319).

This use of the polygraph to chill even individual thought and to chill expression of thought is what the court meant on May 5 when it referred to the polygraph as an "instrument of terror" rather than therapy. Although such "thought control" may be very effective in changing behavior, so are a number of "brainwashing" techniques that the Constitution, and certainly the special education laws, won't permit.

The court also cannot envision a constitutionally permissible justification for the mail control policies of the school. The court perceives a reasonable therapeutice reason for limiting "bad influences" on boys from outside the school; such limits are not unreasonably

restrictive, and the Permanent Injunction modifies the Preliminary Injunction to reflect this point. Both the Preliminary and Permanent Injunction recognize the valid security reasons for allowing inspection for contraband. However these same justifications are insufficient to support school policies controlling to whom the boys may send outgoing mail and controlling the content of that mail. These policies were another vehicle for preventing any criticism of the school. All outgoing mail was read and boys were forced to "rewrite" letters containing things perceived as "untrue" by therapists, or containing "negative thinking" such as criticism of the school. Therapists even wrote comments such as "manipulative" in the margins of letters that boys were allowed to send. Boys knew that their outgoing mail was being read, which chilled the content of their letters even before they were written. One wonders why an institution that seems to be as proud of its programs as the Provo Canyon School would go to such great lengths to avoid critical comment.

Of course the most dangerous aspect of such control of outgoing contacts and their content is that it prevents boys, who may be the victims of abuse within the walls, from crying out for help. It is no answer for the school to simply create and pick its own "advisory board" and add board members to the list of those whom the boys may contact. This court can perceive no adequate basis for the unreasonably restrictive nature of school and parental control over outgoing contacts from boys confined at a residential facility. The very possibility of such contact can temper inappropriate school practices.

As far as the use of both isolation facilities (P-room) and physical force ("hair dance"), the evidence shows that although written school policies forbade excessive

or inappropriate use, actual practices varied from written policies, and excessive or inappropriate use of isolation and physical force took place. The "hair dance", designed as a means of controlling physically violent juveniles without causing them undue physical harm, was used in response to conduct other than physical violence or physical resistance, was used as punishment rather than simply for immediate control, was used as a threat, and on occasion resulted in the very physical injuries it was supposed to prevent.

As plaintiffs' Exhibit 67 shows, the isolation facilities of the P-room were used too often and for intervals that were too long. Other juvenile facilities are permitted to use "time out" procedures, but for shorter intervals, under more carefully controlled conditions and in response to clearly defined physical types of behavior. However the use of the term "out of control" as a justification for the basically uncontrolled discretion of counsellors and others in subjecting juveniles to the P-room and hair dance permitted unreasonably harsh school responses to the conduct of disturbed boys. The Preliminary and Permanent Injunctions intend to more clearly define the appropriate and inappropriate uses of the P-room and physical force.

Finally, the foregoing should show that the court has kept its intrusion into the affairs of the Provo Canyon School to the minimum level necessary to insure the honoring by the school of those rights protected by the Constitution and state and federal special education laws.

We provide comparable protection for convicted felons. School children — particularly troubled school children — deserve no less.

FINDINGS OF FACT

This action came on for trial before the Honorable Bruce S. Jenkins, United States District Judge, sitting with a jury, commencing March 24, 1980, and concluding on April 18, 1980. The following appearances were made:

Kathryn Collard and Martin W. Custen, on behalf of the American Civil Liberties Union - Utah Affiliate, - Salt Lake City, Utah, and Mark I. Soler, Michael J. Dale and Loren M. Warboys, on behalf of the Juvenile Justice Legal Advocacy Project, San Francisco, California, appearing as counsel for plaintiffs.

Harold G. Christensen, Paul C. Droz, Alan L. Larson, Max D. Wheeler, of Snow, Christensen & Martineau, appearing as counsel for defendants Jack L. Williams, Robert B. Crist and D. Eugene Thorne.

Thomas C. Anderson, Assistant Attorney General of the State of Utah, appearing as counsel for defendants Walter D. Talbot, State Superintendent of Public Instruction and the Utah State Board of Education.

Joseph P. McCarthy, Assistant Attorney General of the State of Utah, appearing as counsel for defendant John F. McNamara, Administrator of the Interstate Compact on Juveniles of the State of Utah.

The court and/or the jury heard the testimony of plaintiffs' witnesses: Jack L. Williams, Robert B. Crist, D. Eugene Thorne, Martin H. Gerry, Jerome G. Miller, Paul W. DeMuro, John Billings, John F. McNamara, Daniel L. Creson, Steven Forness, Lisa D. King, Patrick T. King, Timothy Milonas, Jr., Kenneth Rice, Art Child, Howard Sloane, Blaine Lee, Frank Purvis, Diane Horton, James P. Wheeler, Andrew S.

Gallo, Marjorie Child, Bill Harriman and Pat Stack; and the testimony of defendants' witnesses: Robert H. Crist, Delbert Pearson, R. L. Jones, Kay Wilkinson, Paul Whitehead, Marianne Merritt, Mike Avarett, William A. Lowe, Donald H. Keltner, Tom Kreth, Eugene Reed Gibbons, Chris Weenig, JoAnn Bryner, Judy Cole, Quentin Harris, Delbert L. Goates, Pam Roth, Marilyn Anderson, Mike Anderson, Kay Lindsay, Curtis VanAlfen, Judge Monroe Paxman, Guy Toombs, Mae Taylor, Ben Bruse, Robert Gordon Eddington, Denny Butterfield, Glen Stepp, Glen Ovard, Alice Allred, Barbara Graves, Roger Mortensen, Mike Miller, Sydney S. Gilbert, Jerry Spanos, Kevin Colinson, Gerold D. Barton, Walter D. Talbot, Barbara Bateman, Lorri Connin, Beverly McConnell, Jeff James, David Raskin, Gregory Leveridge, Nathan Peck and Matt Barkin; and the court received plaintiffs' Exhibits Nos. 1-193, excluding Exhibits Nos. 37, 44, 51, 55, 97, 98, 109, 110, 188 and 191, and defendants' Exhibits, lettered: 1A through 8Q, excluding Exhibits 7-O, 8C and 3C; and the matter having been fully argued and submitted; and the court being otherwise fully advised in the premises, now hereby makes and enters the following Findings of Fact and Conclusions of Law:

1. The named plaintiffs, Timothy Milonas, Jr. and Kenneth Rice, and the members of the Plaintiff Class which they represent, are juveniles involuntarily confined at the Provo Canyon School by orders of juvenile courts in Utah and other states, by state educational agencies and local school districts in Utah and other states, by public welfare agencies and parents in Utah and other states, immediately prior to or during the pendency of this action, or in the future.

2. Defendants Jack L. Williams, Robert H. Crist and D. Eugene Thorne are the owners and operators of the Provo Canyon School.

3. Defendant ohn F. McNamara is the Administrator of the Interstate Compact on Juveniles for the State of Utah, who, in his official capacity, has supervisory responsibilities with respect to juveniles placed in institutions in Utah by orders of juvenile courts outside the State of Utah.

4. Defendant Walter D. Talbot is the Superintendent of Public Instruction for the State of Utah, who, in his official capacity, is responsible for the supervision of handicapped children receiving special education in the State of Utah.

5. Defendant Utah State Board of Education is the governmental agency of the State of Utah responsible for education of children in the State, and is the "state education agency" for the State of Utah within the provisions of Public Law 94-142, the Education for All Handicapped Children Act.

6. Plaintiffs invoke the jurisdiction of this court pursuant to 28 U.S.C. § § 1331, 1343, 2201 and 2202, 42 U.S.C. § 1983, and pursuant to the United States Constitution and particularly the First, Sixth, Eighth, Ninth and Fourteenth Amendments thereto. Plaintiffs also assert jurisdiction in this court for claims based on Public Law 94-142, the Education for All Handicapped Children Act, 20 U.S.C. § 1401, et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

7. The events and acts of defendants giving rise to this action occurred in the Central Division of the District of Utah.

8. The plaintiffs seek to have this matter certified as a "class action" pursuant to the provisions of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiffs' Second Amended Complaint alleges that the Plaintiff Class consists of "all juveniles who have been, are now, or in the future will be placed at the Provo Canyon School."

9. The case as tried consists of three parallel actions: first, an action for damages by plaintiff Milonas in his individual capacity initiated pursuant to 42 U.S.C. § 1983; second, an action for damages initiated by plaintiff Rice in his individual capacity pursuant to 42 U.S.C. § 1983; and third, an action by plaintiffs Milonas and Rice, in a representative capacity, on behalf of a class of persons pursuant to 42 U.S.C. § 1983, and the United States Constitution, particularly the First, Sixth, Eighth, Ninth and Fourteenth Amendments thereto, and also pursuant to Public Law 94-142, the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, seeking preliminary and permanent declaratory and injunctive relief.

10. Plaintiffs seek declaratory and injunctive relief on the grounds that the following policies, practices and procedures of defendants' Williams, Crist and Thorne, violate plaintiffs' constitutional and statutory rights:

1. Confinement in a secure area in the Orientation Phase without outside exercise or recreation.

2. Deprivation of any personal property other than clothing during the Orientaion Phase.

3. Denial of opportunity to attend religious services while in the Orientation Phase.

4. Required attendance at religious services or "character building classes" after the Orientation Phase.

5. Required sitting or standing, for a minimum of four hours at a time, for at least 250 hours, in order to advance out of the Orientation Phase.

6. Required silent sitting or standing for hours at a time for violating school rules or for getting "Incident Reports."

7. Lack of direct, medical supervision in administration of drugs, and overdosing of psychotropic drugs, including Thorazine, Stelazine, Melaril and other major tranquilizers, and administration of drugs by non-medical personnel.

8. Solitary confinement for long periods of time as punishment in the "Prescription Room" or "P Room", a bare 4' x 8' room containing no reading material, other items of recreation, toilet facilities or personal amenities.

9. Denial of a hearing or any other due process before placement in solitary confinement.

10. Reading and censorship of all mail to and from boys at the school.

11. Regular administration of polygraph tests to boys at the school.

12. Denial of access to legal counsel.

13. Brutality and mistreatment by administrators, counselors and other personnel at the school, including lifting, swinging or dragging children by their hair (the 'hair dance').

11. Plaintiffs also seek declaratory and injunctive relief against defendants Dr. Walter D. Talbot, State Superintendent of Public Instruction, and the Utah State Board of Education, on the ground that they failed to monitor the Provo Canyon School to insure that defendants Williams, Crist and Thorne provided children funded at the institution pursuant to Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973 with special education rights guaranteed to them pursuant to these statutes, which caused plaintiffs to suffer the violation of these rights, including the violation of federal constitutional rights.

12. Plaintiffs also seek declaratory and injunctive relief against defendant John F. McNamara, Administrator of the Interstate Compact on Juveniles for the State of Utah, on the ground that his failure to promulgate standards to govern the placement of children subject to the Compact in private, residential treatment facilities in the State of Utah, and his failure to adequately monitor the placement of plaintiffs in the Provo Canyon School or to adequately supervise such placements, deprived plaintiffs of federal constitutional and statutory rights.

13. This action was filed on September 21, 1978. On that same day, plaintiffs' attorney, Kathryn Collard, filed a Petition for Appointment of Guardian Ad Litem and a Motion for Extraordinary Relief Pending Trial, and this court held a hearing on the motions, the Honorable Chief Judge Aldon J. Anderson presiding. The district court accepted Ms. Collard's representation of the named plaintiffs and granted the Motion for Extraordinary Relief Pending Trial, pursuant to the stipulation of defendants. The court's Order directed James P. Wheeler and the Utah Division of Family Services to assume temporary custody and

control of the named plaintiffs and to provide for their care and treatment pending further order of the court.

14. Although the court did not formally act on plaintiffs' petition to have Ms. Collard appointed as Guardian Ad Litem for the named plaintiffs, Ms. Collard represented the named plaintiffs continuously since September 21, 1978, and on March 5, 1980, this court entered an Order formally appointing Ms. Collard as Guardian Ad Litem for the named plaintiffs.

15. On October 18, 1978, plaintiffs filed their First Amended Complaint. On October 19, 1978, plaintiffs filed a motion to have this action certified as a "class action" pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure. On February 8, 1979, plaintiffs filed a Motion for Preliminary Injunction.

16. On February 21-24, 1979, this court conducted an evidentiary hearing on plaintiffs' motion for class action certification and for preliminary injunction. At the hearing, plaintiffs presented the testimony of defendants Jack L. Williams and John F. McNamara; William D. Harriman and Ronald P. Wing, former students at Provo Canyon School; Gordon Eddington, Andrew Gallo, Robert Miller, Frank Purvis, and Randy Wardwell, former counselors at the institution; and Art Child, former polygraph operator at the institution. Defendant McNamara testified as to his duties as Interstate Compact Administrator, and identified the files of sixteen boys who had been placed at the Provo Canyon School during the previous year by juvenile courts outside the State of Utah. The files were all admitted into evidence. The other witnesses all testified as to the conditions of confinement and the treatment program at the Provo Canyon School, particularly the specific policies and practices challenged by plaintiffs. Defendants presented the testimony of de-

fendant Crist; Gerold Spanos and Dolly Miller, both employees of the institution; William Holman, parent of a juvenile at the institution; Banae Stout, natural mother of plaintiff Milonas; D. Eugene Thorne, then a consultant for the Provo Canyon School; and Judge Monroe Paxman, a former juvenile court judge who had visited the institution.

17. During the hearing the district court ordered defendants to provide information regarding sources of funding for the institution. A summary of the information was prepared by the defendants and received in evidence. The summary contained the following information:

TOTAL TUITION BILLED
FOR 1978 ..... $1,846,783.00

MONIES RECEIVED FROM VARIOUS SOURCES:

School Districts

Utah Districts (all year) 5,517.17
(9 boys)

Other states:

Jan.-June, '78 ($698. mo. ea.) 75,383.41
(18 boys)

Jul.-Dec., '78 ($724. mo. ea.) 182,504.71
(42 boys)

*Funds paid to parents. (NOTE: To date, 37 boys receiving school funding.)

Probations

Various Counties Other States 107,244.86
(10 boys)

Utah Division of Family Services	8,800.00 (1 boy)
Alaska Division of Corrections	83,960.69 (10 boys)

All Other Sources of Tuition Received in Private Funding.

18. At the conclusion of the hearing, this court made a provisional finding of subject matter jurisdiction under 28 U.S.C. § 1343, and provisionally certified the action as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The court noted:

> For the purpose of preliminary relief only, and until further order of the court, the Plaintiff Class shall consist of all juveniles residing at the Provo Canyon School during the pendency of this action. The issues of whether this action may be brought as a class action, and the membership in the class shall be subject to redetermination upon motion by a party or the court as circumstances may warrant.

19. The court also enjoined defendants Williams and Crist from subjecting members of the Plaintiff Class to the following treatment, or conditions of confinement, which encompassed four of the thirteen practices challenged by the plaintiffs in their Complaint:

> 1. Opening, reading, monitoring or other censorship of mail to or from students at the school, except for purpose of detecting or removing contraband.
>
> 2. Administration of polygraph examinations for any purpose.

3. Placement of students in the "P Rooms" or other isolation facilities for any reason other than to contain a student who is physically violent and dangerous to himself or others, and only for the period of time during which the student is physically violent and dangerous to himself or others.

4. Use of physical force for any purpose other than to restrain a student who is physically violent and immediately dangerous to himself or others, or to overcome physical resistance to institutional rules. The force used must be restricted to the least amount reasonably necessary in the circumstances.

20. The court also accepted and incorporated into its Order a stipulation for the entry of a Preliminary Injunction against the defendant McNamara, whereby said defendant agreed to be restrained and enjoined from approving the placement of juveniles in the Provo Canyon School during the pendency of this action, and to effect the removal from the school of any juveniles subject to the terms of the Interstate Compact On Juveniles who were in the School pursuant to orders of juvenile courts in states outside the State of Utah.

21. On August 21, 1979, this court granted plaintiffs' motion to amend their complaint, and plaintiffs filed their Second Amended Complaint.

22. On November 16, 1979, plaintiffs and defendants Williams, Crist and Thorne, agreed upon a Stipulated Pretrial Order in this matter.

23. On February 1, 1980, defendants Williams, Crist and Thorne moved for summary judgment in this matter. On the same day, defendants Utah State Board of

Education and Walter D. Talbot also moved for summary judgment. On February 5, 1980, plaintiffs also moved for summary judgment.

24. On February 13, 1980, this court denied the motion for summary judgment, without prejudice, of the defendants Dr. Walter D. Talbot, and the Utah State Board of Education.

25. On March 6, 1980, this court denied the motion for summary judgment of defendants Williams, Crist and Thorne.

26. On March 20, 1980, this court denied the motion for summary judgment of plaintiffs.

27. On March 25, 1980, this court, sitting with a jury, commenced the trial of the named plaintiffs' individual actions for damages against defendants, which matter was finally argued and submitted to the jury on April 18, 1980.

28. On March 31, 1980, plaintiffs and defendants Walter D. Talbot and the Utah State Board of Education submitted to this court a stipulation for the entry of a Consent Decree and Judgment regarding said defendants which this court signed and entered on the same date.

29. On April 4, 1980, plaintiffs and defendant John F. McNamara submitted to this court a stipulation for the entry of a Consent Decree and Judgment regarding said defendant which this court signed and entered on the same date.

30. On April 18, 1980, the jury returned a verdict in the individual damage actions of the named plain-

tiffs, Rice and Milonas, against these plaintiffs and for the defendants Williams, Crist and Thorne.

31. On April 22, 1980, plaintiffs filed a Motion for Judgment Notwithstanding The Verdict in the individual damage actions of the named plaintiffs, and on April 24, 1980, defendants filed a Motion for Entry of Judgment on the Verdict.

32. On April 24, 1980, defendants Williams, Crist and Thorne filed a Motion to Dismiss Plaintiffs' Claims for Injunctive Relief.

33. On May 5, 1980, this court, following a hearing and full argument by all parties, denied plaintiffs' Motion for Judgment Notwithstanding The Verdict in the individual damage actions of the named plaintiffs, and granted defendants' Motion for Entry of Judgment on The Verdict as to the individual damage actions of the named plaintiffs. The court also denied defendants' Motion to Dismiss Plaintiffs' Claims for Injunctive Relief, and awarded permanent injunctive relief based on oral Findings and Conclusions memorialized herein.

34. The court finds that defendants Williams, Crist and Thorne acted under color of state law in subjecting the plaintiff class to the very practices that plaintiffs allege are unconstitutional or otherwise in violation of federal law. There is a substantial nexus between the federal statutory and constitutional violations alleged, and the continuous placement, regulation and substantial funding of children at the Provo Canyon School by state and local governmental entities and instrumentalities such as school districts, juvenile courts and welfare agencies. The Provo Canyon School is a joint participant with these state agencies, and

acts pursuant to powers and duties shared or delegated by these state agencies, in providing residential treatment, rehabilitation and education to juveniles. Even though not every boy at the school is subject to direct state action, the majority are, and state action is so intertwined with all aspects of the operations of the Provo Canyon School that the school as a whole operates under color of state law in all of its activities.

35. Additionally, the court finds that plaintiffs' class claims for injunctive and declaratory relief arise under federal law, specifically Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, and that as to each such claim by an affected class member, the amount in controversy exceeds $10,000, exclusive of interest and costs.

36. Because of the class nature of plaintiffs' claims, and the absence until trial of any state administrative mechanism in Utah for applying federal special education laws to "private" facilities subject to these laws, resort to state administrative remedies contemplated by these laws would have been futile.

37. The court finds that the appropriate plaintiff class to be certified for purposes of final injunctive and declaratory relief consists of all boys residing at the Provo Canyon School now and in the future. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the court makes the following findings respecting this class and its representatives:

> (a) At the time this action was filed, the two named class representatives sought to certify a class for purposes of injunctive and declaratory relief, were members of the class they sought to represent, and had ripe claims for injunctive and declaratory relief as individuals. The named plain-

tiffs' individual claims for injunctive relief became moot after this court, the Honorable Chief Judge Aldon J. Anderson presiding, removed the two boys from the custody of the Provo Canyon School based upon allegations of imminent and irreparable harm likely to be suffered by them as a result of the filing of this action, and based upon the stipulation of the school. Even after they had left the school, the two named plaintiffs continued to vigorously litigate the questions of class certification and relief, and these questions continued to present concrete, sharply contested issues even after provisional class certification by the court, so that the named plaintiffs retained a personal stake in the questions of class certification and relief throughout this litigation.

Furthermore, boys continuing to reside at the Provo Canyon School would have been unable to effectively litigate this action as class representatives while residing there, and defendants had the power to moot injunctive claims of any class representative residing at the school by unilaterally discharging that boy from the school.

(b) Because the class to be certified is fluid, it is too numerous for joinder of all members to be practicable.

(c) There are numerous questions of fact and law common to the class; the claims of the named representatives are typical of the class claims; and the named representatives have fairly and adequately protected the interests of the class.

(d) Defendants Williams, Crist and Thorne have acted and refused to act on grounds generally applicable to the class.

38. Defendants Williams, Crist and Thorne have subjected the plaintiff class to policies and practices concerning the use of the polygraph, mail censorship, isolation, and physical force that are not reasonably related to therapy, rehabilitation, education, school security, or school administration, and these policies and practices are unreasonably restrictive in light of these legitimate purposes for confinement at the Provo Canyon School, and in light of class members' rights to at least restrictive treatment alternative under the special education laws, and their constitutional rights to due process, including appropriate treatment, as well as their constitutional rights to freedom of speech, access to legal counsel, and privacy, under the First, Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution.

39. As to the balance of the practices and policies at issue, as they presently exist, they are reasonably related to legitimate school treatment and security purposes, and are not unreasonably restrictive in light of these purposes, or in light of the constitutional rights of class members. The court makes no finding as to whether these remaining practices and policies violate rights to the least restrictive treatment alternative or other rights under federal special education laws, due to the newly found regulatory authority of defendants Talbot and State Board of Education under the federal special education laws, and under the court's Consent Decree.

40. Despite some evidence of "voluntary" changes in school policies and practices, the court finds that the polygraph, mail monitoring, isolation and physical force policies and practices were changed only in response to the court's Preliminary Injunction, and that

without a Permanent Injunction those policies and practices would likely recur, to the irreparable harm of the plaintiff class. The court further finds that compliance with the court's Permanent Injunction poses no substantial hardship for the Provo Canyon School, that the Permanent Injunction is the least intrusive remedy necessary to protect the rights of the plaintiff class, and that the Permanent Injunction is a necessary supplement to the court's final Orders regarding the Administrator of the Interstate Compact on Juveniles, the State Board of Education, and Superintendent Talbot.

41. The court finds that the practices at issue in this case were in effect at the time the action was filed, or within one year previously.

42. The court finds that it has been able to award meaningful relief based upon the existing parties to the suit and that the right of non-parties have been adequately protected.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are also incorporated herein as Conclusions of Law.

2. The court has not viewed the class claims in this action as encompassing any class claim for damages, primarily because the named plaintiffs, in their capacity as representtives for the plaintiff class, never invoked the notification procedures of Rule 23(c)(2), F.R.C.P. required for prosecution of any damage claims on the part of the class.

3. In examining the evidence presented in the trial of the individual damages actions of plaintiff Milonas and plaintiff Rice in the light most favorable to the named defendants, the court finds that plaintiffs' Mo-

tion for Judgment Notwithstanding the Verdict ought to be denied and is denied.

4. Defendants Williams, Crist and Thorne have moved this court to dismiss the plaintiffs' class claims for injunctive relief, arguing that adverse jury verdict as to the individual damage action of Milonas and Rice, plus the dismissal by the court, without prejudice, of any residual class claims for damage, bars injunctive relief. However, the court finds that the adverse verdict of the jury as to the individual damages claims of plaintiffs Milonas and Rice relates only to the individual damage claims of these plaintiffs and did not determine the issues of fact raised by plaintiffs' class claims for declaratory and injunctive relief. The jury decided only that the named plaintiffs were not individually deprived of certain constitutional rights as the proximate cause of the knowing acts of the defendants Williams, Crist and Thorne. The evidence as to the individual claims of the named plaintiffs is weaker in virtually every respect than the evidence of violations suffered by the plaintiff class. The plaintiffs' class claims were not before the jury, nor were the claims of violations of federal special education laws. The basis for the jury's verdict in regard to the individual plaintiffs' damage claims could rest on any number of grounds which would not apply to the claims of the plaintiff class as a whole.

This court has the duty and the discretion under its equitable jurisdiction to make an independent review of the evidence in support of the plaintiffs' class claims for declaratory and injunctive relief. Therefore, defendants' Motion to Dismiss plaintiffs' class claims for declaratory and injunctive relief is denied.

5. A far broader jurisdictional and factual basis now exists for the granting of plaintiffs' class claims for declaratory and injunctive relief than existed at the time of the entry of the Preliminary Injunction herein. The court finds that it has jurisdiction over plaintiffs' class claims for declaratory and injunctive relief pursuant to 28 US.C. § 1343, and 28 U.S.C. § 1331, based on causes of action asserted under 42 U.S.C. § 1983, P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973.

6. The court finds that the plaintiff class may properly bring a private cause of action for declaratory and injunctive relief against defendants Williams, Crist and Thorne, pursuant to P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973.

7. The court finds that the plaintiff class was not required to resort to state administrative remedies before filing claims based on the federal special education laws, because resort to such remedies would have been futile.

8. There is and has been a federal statutory duty imposed on the defendant Utah State Board of Education and upon school districts in various states, to monitor the Provo Canyon School for compliance with Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, as to students who are receiving special education funds or who are placed by school districts for special education. There is also a duty on the part of Provo Canyon School, as a recipient of children funded by federal special education funds or placed by school districts for special education, to comply with the provisions of Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973.

9. The court and the parties welcome the belated appearance on the scene of the State Superintendent of Public Instruction and the Utah State Board of Education and their recent agreement to fully and effectively perform their federal statutory duties as prescribed in Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, with respect to the monitoring of Provo Canyon School and similar institutions, to insure compliance with the provisions of these laws. At the time of the hearing on the Preliminary Injunction in this matter, the court lamented the fact that the state education agency and its chief officer had failed to monitor practices at the Provo Canyon School. Certainly, the state's assumption and execution of its duties will insure that the Provo Canyon School will more fully comply with federal special education laws in the future than the institution did in the past. However, the Consent Decree entered into by the state does not fulfill the needs of the plaintiff class for a Permanent Injunction against certain school practices and in fact anticipates such an injunction.

10. The court finds that this action should be certified as a class action pursuant to the Federal Rules of Civil Procedure, Rule 23(a) and (b)(2). For purposes of the Preliminary Injunction, the court provisionally certified a class consisting of all juveniles residing at the Provo Canyon School during the pendency of this action. The court now finally certifies a class consisting of all juveniles residing at the Provo Canyon School now or in the future. Under *U.S. Parole Commission v. Geraghty*, and the particular facts of this case, the mootness of the individual injunctive claims of the named class representatives does not bar them from litigating the class claims for injunctive relief. The named class representatives need not belong to each

purported subclass within the larger class, and need not have suffered identical forms of injury.

11. The court has found that Provo Canyon School and the defendants Williams, Crist and Thorne, stand in *loco parentis* for some purposes, and that parents or guardians have consented to some policies and practices at issue in this case. However, the court concludes that since the school and the defendants who operate it act under color of state law and under color of federal special education laws, the defendants may not deprive members of the plaintiff class of constitutional rights or federal rights to special education, even with parental consent.

12. The court also finds that the plaintiffs' class claims for declaratory and injunctive relief are not barred by the one year statute of limitation in Utah Code Annotated § 78-12-29.

13. The plaintiffs' class claims for declaratory and injunctive relief are not barred by their alleged failure to join indispensable parties.

14. The court finds that certain policies and practices of the defendants Williams, Crist and Thorne, have violated federally protected statutory rights to special education, specifically the right to the least restrictive form of special education and related treatment, and the following constitutional rights: freedom of speech; due process, including the right of an involuntarily confined juvenile to receive therapeutic treatment in an appropriate setting; the right to legal counsel; and the right to privacy.

15. The court finds that because there has been no adjudication of guilt of a criminal offense as to any

member of the plaintiff class, the plaintiff class is not protected by constitutional prohibitions of cruel and unusual punishment. This view is consistent with the attitude of the law towards juveniles who have not been convicted of a criminal offense but have been determined to be delinquent, in need of treatment, or in need of special education and have been confined in an institution for purposes of receiving treatment, rehabilitation or education. However due process does require that reasonable treatment, rehabilitation and education be provided to those juveniles.

16. In the pretrial order, plaintiffs identified some thirteen alleged policies or practices of defendants Williams, Crist and Thorne. Of these policies, the court finds that the following policies or practices violated one or more of the constitutional rights specified above and violated federal statutory rights to special education and related treatment in the least restrictive setting. The court finds that none of the following policies or practices of the defendants are reasonably related to treatment, to security, or to any other permissible goals, and all are unreasonably restrictive.

17. The defendants Williams, Crist and Thorne shall be permanently restrained and enjoined from subjecting members of the plaintiff class or causing them to be subjected to the following listed policies, practices, treatment or conditions of confinement:

(a) Opening, reading, monitoring or refusing to mail any correspondence from members of the plaintiff class to parents, friends, attorneys or other persons, or in any manner restricting the manner or mode of such communications or the number or type of persons with whom such juveniles may wish to correspond.

(b) Reading, monitoring or refusing to deliver any correspondence mailed by any person outside the Provo Canyon School to any member of the plaintiff class in the Provo Canyon School, with the following exceptions. Defendants shall only be permitted to open such correspondence if contraband items are included therein, and to remove such items, if present. In addition, where parents have previously indicated that certain, named individuals outside the Provo Canyon School are not to be permitted to correspond with members of the plaintiff class inside the institution, the school owners may return correspondence from such designated persons to them unopened. However, in no case shall correspondence being sent by members of the plaintiff class to persons outside the institution be opened nor shall defendants refuse to mail such correspondence.

(c) Administration of polygraph examinations to members of the plaintiff class for any purpose whatsoever.

(d) The placement of juveniles in the "P room" or isolation facilities for any reason other than to contain a juvenile who is physically violent and dangerous to himself or others, and only for that period of time during which a juvenile remains physically violent or a danger to himself or others.

(e) Use of physical force for any purpose other than 1) to restrain a juvenile who is physically violent and an immediate danger to himself or others, or 2) to overcome physical resistance, passive or otherwise to institutional rules, and such force shall be restricted to the least amount reasonably necessary to bring a juvenile under physical restraint or to overcome physical resistance in such circumstances.

18. Although the court commends defendants for their voluntary efforts in improving the Provo Canyon School's programs, a Permanent Injunction against the above policies and practices is the least intrusive remedy reasonably necessary to adequately protect the rights of the plaintiff class.

19. The court finds that the remaining practices and policies of the defendants Williams, Crist and Thorne, as these policies and practices presently exist, do not violate the constitutional rights of the plaintiff class.

20. As to these remaining policies and practices, pursuant to the Consent Decree, the Superintendent of Public Instruction and the Utah State Board of Education should be allowed to make determinations as to the requirements of applicable special education laws and to monitor and oversee compliance with these laws by the Provo Canyon School.

21. The defendants Williams, Crist and Thorne shall be ordered to comply with the duly promulgated orders and regulations of the defendant Utah State Board of Education regarding special education, and shall be enjoined from directly or indirectly receiving state or federal funds earmarked for special education unless the Provo Canyon School is in full compliance with the rules and orders of the Utah State Board of Education and the requirements of state and federal special education laws.

22. The permanent injunction previously described shall be effective forthwith, and shall supersede the Preliminary Injunction that the court has entered previously.

23. As to the class action for declaratory and injunctive relief, plaintiffs are the prevailing parties and are

entitled to a reasonable attorney's fee and costs pursuant to 42 U.S.C. § 1988. As to the two individual claims for damages, defendants Williams, Crist and Thorne are the prevailing parties and are entitled to costs pursuant to 28 U.S.C. § 1920 et seq. Amounts of respecitve attorney's fees and costs, and the question of offset, will be determined by subsequent Orders to be issued after final Judgments on the merits are entered.

DATED this 25 day of August, 1980.

BY THE COURT:

BRUCE S. JENKINS

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM — NOVEMBER 9, 1982

Nos. 80-1569 and 81-1407

TIWOTHY MILONAS, JR. and KENNETH RICE, by and through their attorney and Guardian Ad Litem, Kathryn Collard, PLAINTIFFS-APPELLEES,

vs.

JACK L. WILLIAMS, Owner and Administrative Director, Provo Canyon School; ROBERT H. CRIST, Owner and Medical Director, Provo Canyon School, D. EUGENE THORNE, DEFENDANTS-APPELLANTS,

JOHN F. MCNAMARA, Director and Administrator, Interstate Compact on Juveniles, DEFENDANT,

CENTER FOR LAW AND EDUCATION, INC.,

Amicus Curiae.

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Clarence A. Brimmer, Jr., District Judge*'

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellants in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en blanc is denied. Judge McKay did not participate in consideration of this matter.

HOWARD K. PHILLIPS, *Clerk*

By ROBERT L. HOECKER

Chief Deputy Clerk

APPENDIX D

Excerpts from Transcript of Trial,
Milonas v. Williams, No. C-78-352

Re: Polygraph:

. . . .

Q. With regard to a particular type of boy, what type of boy might be helped by the use of the polygraph?

A. I think a boy who was particularly antisocial, who had almost no conscience development and no regard for the truth of the rights of others and who would say anything and rather convincingly and be highly manipulative to get what he wants at the expense of others, I think this type of boy might be helped through the polygraph in terms of helping the staff understand this boy, what his objectives are, and helping him become aware of the consequences of his actions. It may also protect the other kids if this particular boy has an aggressive design on other students.

Tr. at 2038-39 (direct testimony of PAUL L. WHITEHEAD, M.D., Chairman, Dept. of Child Psychiatry, Primary Children's Medical Center).

. . . .

Q. And based upon your understanding of the context in which the polygraph was used at the school, and based on your experience and training in the field, do you have an opinion as to whether the polygraph can be used usefully in a setting such as the Provo Canyon School?

A. Yes, I do.

Q. What is that opinion?

A. That opinion is that when it comes to the aspect of it regarding deterrents and along with that rehabilitation with regard to specific acts which were part of the problem situation presented by an individual or prohibited by regulations at the school, that it can be an effective tool in bringing about behavorial change in those areas. But, on the other hand, when it came to instances regarding an individual's personal feelings or attitudes about various aspects of things, I felt that that was not a proper application of the technique and should be eliminated from the testing program.

Q. And that was the basis of your ultimate recommendation to the school?

A. Yes. And also I should add questions about the interaction between the student and his therapist. I did not feel that that was appropriate material for testing with the polygraph. But my recommendation then was to eliminate those two areas and to concentrate in the areas where there was specific instances of transgression or definite reasons for suspecting an individual being involved in such acts.

Q. Why it is that the one area of inquiry, in your judgment, would be appropriate, and the other area questionable, in your mind?

A. Well, there are, I think, essentially two reasons. One would be that polygraph techniques have been demonstrated to be effective and accurate when it comes to the assessment of truthfulness with regard to specific events or incidents where it is a question of fact as to whether or not certain things occurred or whether or not an individual is involved in a certain specific activity which is

clearly recognizable by that person. And given that basic area within which polygraph techniques have been demonstrated to be effective, that certain aspects of the program fit into that; whereas, other aspects have to do with judgments and feelings on the part of the subject and that really is a much more difficult area in which to establish any specific truthfulness or lack of truthfulness because they require judgments and opinions on the part of the subject and that's very difficult. And, secondly, I felt that in some respects the use of the polygraph as part of a tool to insure compliance with regard to thoughts and attitudes would be counter productive in relation to an attempt to engage in psychotherapeutic techniques to bring about behavioral change. So that I felt that actually it would be working at cross-purposes to a therapy program to use the polygraph to investigate a student's interactions with this therapist. That that should be kept separate.

Q. As far as you know, your recommendations were implemented at the school?

A. That is my understanding.

Tr. at 2994-96 (direct testimony of DAVID C. RASKIN, Ph.D., psychophysiologist and professor of psychology, University of Utah).

. . . .

Q. What, in your judgment, was the value of the use of the polygraph?

A. Well, the polygraph was a useful instrument. After the experience of it, by the way, the boy was able to integrate the experience. In dealing with a boy in therapy and in treatment, it's often very difficult to know exactly where's he's at

at all times especially if they're inclined to try to manipulate or to lie or to control the situation. It's a very basic premise in therapy that before you can have any impact at all on a person's life, you must have some kind of an honest relationship and be working on common goals. The polygraph became a useful instrument in helping young men to be accountable for their behaviors, and to determine on many occasions whether or not they were telling the truth or telling a lie about certain aspects of their program. To many of the young men it became a way of proving themselves. A lot of them felt very proud after being able to prove that they could do that. I think it gave some of them a certain status and a certain sense of pride being able to accomplish these kind of tasks. And in my personal relationship with the young men that I've counselled with there, in often times opened up some new vistas and avenues in dealing with their parents where many of the relationship and communication disorders were very prevalent.

Tr. at 2794 (direct testimony of JERRY SPANOS, M.S., Social Work; supervising therapist at Provo Canyon School).

. . . .

Q. [W]ith regard to your understanding of the use of the polygraph at the Provo Canyon School. Would you tell us how that was used, your understanding of its use, and how it was helpful, if it was.

A. When I arrived at the school, it was explained to me that the polygraph was used to work with students in facing their own behaviors and in dealing with the issues that they had been running away from for long periods of time. It was just one tool in aiding them to take responsibility

for their actions rather than denying running away from them or escaping in some way either through drugs, denial or whatever. And so it was used on a periodic basis with boys. Before a boy was to leave the locked unit of the school, they were tested on the polygraph to make sure they had resolved the issues within their mind, that they were being honest with themselves about their willing ness to face problems and issues, and to make sure that they were not just going to run away as soon as they got out the door.

Q. In your judgment, was the use of the polygraph helpful in the treatment of most boys?

A. With the type of boy that we were working with, I felt that it was extremely useful as a therapeutic technique to get them to deal with the issues rather than to avoid them and run away from them. I would not recommend the polygraph with the use of some types of boys or other people with different types of problems. But the general type of boy that we were working with, with problems that they were facing, the behaviors that they were exhibiting and their mode of escaping from them, I think it was a very useful tool to get them to face it because unless a boy can face the problems and resolve them and learn new skills in coping with the facing of those problems, the problems are going to persist and they will continue to burglarize. They will continue to have problems in relationships. They will continue to fail in school. They will continue the negative activities that they have been involved in that are destructive within their lives.

Q. Can you give us a specific example without using the boy's name, how the use of the polygraph may have helped him?

A. I had one particular boy that was extremely negative, having a very difficult time. We put him on the polygraph. He was progressing slowly, but he had progressed just about to the time that he could move out, but there was still something blocking him. He would get up to that time and then fail and then get up to that time and fail personally, not on the polygraph.

Q. What do you mean fail personally but not on the polygraph?

A. He would act out in some way. He would get abusive with counsellors, teachers or students, get in a fight, do something in order to prevent himself from moving out. And I had a hard time figuring out what that problem was. He got up to the point where we could put him on the polygraph to get him to move out, to get him out into the open units, and the polygraph operator said there was something there that he was not telling the truth on that was bothering him extensively. Come to find out, when I confronted him with that issue, that he was afraid to discuss with us a homosexual activity that he was involved in with a teacher in his former school. And that once that issue was out in the open and we could deal with that, he was able to resolve enough of those issues to be able to get into the open units. He could deal with that and progress was forthcoming from that point in time.

Q. Were they ever occasions when boys would request to take the polygraph?

A. Most certainly. I recall particularly one time after the polygraph was discontinued at the school based on the orders of this Court, a boy had accused another boy of a very serious act in a drug offense in supplying and providing drugs.

And he was most certain that he did not and was not involved in that and requested to take the polygraph, but we had to deny that. And he repeatedly asked because he wanted to make sure that everyone was aware that he was not involved in those activities. And we did use our judgments and resolve many of those issues I think without the polygraph. But he wanted to do that. And I had boys request to prove themselves on the polygraph periodically.

Tr. at 1932-35 (direct testimony of GEORGE M. AVERETT, M.S., Social Work; Asst. Professor, Adams State College; past therapist at Provo Canyon School).

Re: Mail Monitoring:

. . . .

Q. How did [mail monitoring] fit into the therapy program?

A. The mail becomes an area whereby therapists could intervene and develop a treatment plan in respect to communicative disorders. It's often helpful to be able to know the interactions between a young man and his parents, if that's what we're treating at that particular point. And it also became a useful avenue for us to intervene in that area, to be able to help a young man to be able to develop his articulation, to be able to say the things he really wanted to say, and to be able to communicate in the way that would help fulfill his needs. That was our intent in using it. That was the primary determinant. The other one, secondary, would be we were concerned about security, about contraband. We certainly didn't want young men writing to their friends and telling them to meet them at the front gate so they could, you know, take off. You can't treat them if they're not

there. And also we're concerned about the habitual use of drugs of many of the kids, and it's not uncommon for the young men to try to get this through the mail. So that was another secondary reason why we monitored the mail.

Tr. at 2795 (direct testimony of JERRY SPANOS, [*see supra.*]).

. . . .

Q. Was there monitoring of mail at the school while you were there?

A. Yes, sir.

Q. What would that consist of?

A. Briefly reviewing the letters, in-coming letters, to kind of get a glimpse of what's happening with the boy.

Q. Would you review outgoing letters?

A. Yes, sir.

Q. What was the reason for that?

A. Mainly prevention of any major problems. Boys are not wanting to be at the school. Their desire is not to change their behavior generally, and so sometimes they would request for drugs to come in or request for help from a friend to run away or to provide them with an outlet.

Q. In your judgment, was the monitoring of the mail of assistance to you as a therapist?

A. It was a long drawn out process that was not always as helpful as could be. But it was useful in the sense that you could see how relationships developed, and how the boy was relating to

friends and family, and how possible to assist that student to improve their functioning in society generally. They had a tendency to have poor relationships in many areas of their lives.

Tr. at 1918-19 (direct testimony of GEORGE M. AVERETT [*see supra.*]).

. . . .

Q. Were you concerned about the boys' privacy being violated by having a secretary read his mail?

A. I think you're concerned about privacy if anyone reads anybody's mail. I think it's very important that people have privacy. But at the same time it's very important to have, you know, a structiure within a school that's going along a certain line. That's maybe even more important. It's not an orphanage. It's to bring about a specific change in a boy's life, and you have a specific amount of time to do it, and it's all business.

Q. It's all business?

A. It's business in the sense you've got to stay after it. It's hard work.

Q. So your concerns for the boys' privacy were overridden by your desire to use what you considered a therapeutic technique?

A. Certain boys, yes. Not all boys.

Q. Wasn't it true that all boys' mail was read?

A. Not true.

Q. Which boys' mail was not read?

A. The therapist would decide.

Q. You mean a therapist could decide not to read some boy's mail?

A. There was obviously no need to read certain boys' mail. Other boy's mail, it was very necessary.

Tr. at 202 (direct testimony of JACK L. WILLIAMS, Administrative Director, Provo Canyon School).

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No. 82-1342

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JACK L. WILLIAMS, ROBERT H. CRIST and D. EUGENE THORNE, Petitioners,

v.

TIMOTHY MILONAS, JR. and KENNETH RICE, ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 691 F.2d 931.

STATEMENT OF FACTS

This lawsuit was brought by two juveniles confined at the Provo Canyon School by juvenile court officials in Nevada and Alaska. Contrary to the picture painted by the petitioners in their Statement of Facts, the unique and punitive nature of this institution is fully described in the Court of Appeals opinion. (Petitioners' App. A., 5a-7a.)

After a lengthy trial and substantial testimony and documentary evidence recounting the active involvement of juvenile courts, school districts and state education and welfare agencies with the placement of children and the practices at Provo Canyon School, the District Court found that the petitioners had acted "under color of state law" within the meaning of 42 U.S.C. §1983

(1976).[1/]

Having found jurisdiction, the District Court permanently enjoined the petitioners' practices of (1) subjecting boys to polygraph examinations to discern and control their thoughts, (2) reading and censoring boys' mail as a means of controlling their thoughts and preventing criticism of the Provo Canyon School, (3) placing boys in stark isolation rooms for lengthy periods of time as a method of punishment and control, and (4) using excessive physical force, including a practice at the facility known as the "hair dance" (Petitioners' App. A.,

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1/ The District Court also found jurisdiction under the Education of All Handicapped Children Act, 20 U.S.C. §1401, et seq. and §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Because the Court of Appeals agreed with the District Court's finding of jurisdiction under 42 U.S.C. §1983, it did not reach the question of independent jurisdiction under the federal special education statutes.

Petitioners' App. B., 74a-78a). The evidence at trial, taken as a whole,[2] clearly established that these practices were oppressive, arbitrarily used, and totally unrelated to any legitimate purpose of the institution. The Court of Appeals unanimously affirmed these findings of the District Court, and a motion for a rehearing with a suggestion for a rehearing en banc was denied.

REASONS THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the Questions Presented in the petition.

Petitioners have asked this Court to grant certiorari to determine whether a

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2/ Petitioners have included in their list of appendices excerpts from the trial record. (Petitioners' App. D.) Nevertheless, it is clear that in this type of factual determination, selected and isolated excerpts from a 19-day trial are of little value when compared with the total review of the record conducted by the District Court and the Court of Appeals.

private party becomes a "state actor" under the Federal Civil Rights Act simply because it has some state contracts or is subjected to limited state regulation and where the practices or procedures enjoined below "are not regulated, coerced or even encouraged by any state agency." (Questions Presented, Nos. 1 and 2.) These questions have little relationship, if any, to the actual record in this case and are totally inconsistent with the detailed and specific factual findings of the Court of Appeals and the District Court below.

The factual basis for the Court of Appeals' and District Court's conclusion that "the enjoined practices were carried out under the cloak of state action" is summarized in the Court of Appeals opinion. (Petitioners' App. A., 16a.)

In so ruling, the Court of Appeals referred to a veritable mountain of

documentation regarding the closely intertwined relationship between the defendants and the juvenile courts and state agencies which sent boys to the facility. At the trial, plaintiffs presented as evidence the court files of boys placed at Provo Canyon by Alaska juvenile court judges. The files demonstrate that "Classification Committees" in Alaska recommended placement of the boys at Provo Canyon, Alaska juvenile court probation officers and the Alaska Interstate Compact Administrator contacted the petitioners and officially applied for placement of the boys, the Alaska juvenile court formally approved each placement, and Alaska juvenile court probation officers signed Provo Canyon institutional forms in lieu of the boys' parents or guardians. At the request of the Alaska Interstate Compact Administrator, personnel from the

Utah Interstate Compact Administrator's office visited Provo Canyon and reported on the condition of the boys. In addition, the boys' "therapists" at the facility made monthly reports to the Alaska juvenile court probation officers on the boys' "progress." Perhaps most importantly, the Alaska juvenile court files refer to

> ...Provo Canyon School, acting as an agent of the Department of Health and Social Services, Division of Corrections...

The juvenile courts in other states sending boys to Provo Canyon exercised similar control and supervision.

The named plaintiffs were placed, supervised, and monitored at Provo Canyon by juvenile court judges in precisely this way. Plaintiff Kenneth Rice was committed to Provo Canyon by an Alaska juvenile court judge; plaintiff Timothy Milonas was placed by his mother as a condition of probation imposed by a Nevada juvenile

court. Indeed, the Nevada juvenile court judge was listed as legal guardian and supervisor in Milonas' application to Provo Canyon, and when the boy ran away from the facility, the juvenile court judge issued a bench warrant for his arrest.

The school districts and other state agencies sending boys to Provo Canyon exercised similar control and supervision. The state agencies maintained their control and supervision through six different means: (1) written contracts between the school districts and the petitioners, which included reimbursement for "counseling and guidance" in addition to formal educational services; (2) separate "Service Agreements" between the school districts and the petitioners, which provided additional requirements for the facility; (3) confirmations of compliance with minimum educational

standards, which detailed further requirements, and which were personally signed by the petitioners; (4) the requirements of Public Law 94-142, the Education of All Handicapped Children Act, 20 U.S.C. §§1401-1461, and its implementing regulations, e.g., 34 C.F.R. §§104.33(b)(3), 104.37, 300.2(c), 300.306, 300.550-556, 300.341, 300.347, 300.600, and Subpart D; (5) the requirements of state statutes and regulations governing the provision of special education to handicapped children, e.g., California Education Code §§56000-56885; and (6) regular monitoring and evaluation of the petitioners' facility by representatives of the various school districts.

For boys placed at Provo Canyon both by juvenile courts and by school districts and other state agencies, the large volume of evidence was more than sufficient to

demonstrate that "the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions." (Petitioners' App. A., 16a.) See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Moreover, the record established a clear "nexus" between state involvement and the specific practices enjoined by the District Court. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). For example, the petitioners' censorship of mail to and from boys committed to the facility by juvenile courts was literally made possible by the probation officer's signing of the "Correspondence/Visit/Phone List" and "Supervision of Communications" form in lieu of the boys' parents or guardians. The same was true of administration of polygraph examinations: the probation officer specifically

petitioned for, and the juvenile court specifically approved, authorization for the petitioners to conduct polygraph examinations of boys committed to the school.

The situation was analogous for handicapped boys placed at the facility for special education. The record at trial demonstrated that 28% to 38% of the state special education funding went to the petitioners and Provo Canyon School for the provision of "counseling and guidance" and "psychotherapy" to handicapped boys. And the petitioners themselves admitted at trial that they considered the four enjoined practices to be important aspects of the "therapy" program.

Finally, the petitioners' reliance on Rendell-Baker v. Kohn, 102 S.Ct. 2764 (1982), affirming, 641 F.2d 14 (1st Cir. 1981), and Blum v. Yaretsky, 102

S.Ct. 2777 (1982), is clearly misplaced. Although Rendell-Baker did involve a private school, the crux of the case, for both the Court of Appeals and this Court, was the fact that the state funding and regulation pertained to student services at the New Perspectives School, not to employee personnel policies. Since there was no "nexus" between the state involvement and the challenged activity (i.e., the alleged wrongful discharge of plaintiff Rendell-Baker), there was no "state action" for the purposes of 42 U.S.C. §1983. See Rendell-Baker v. Kohn, supra, 641 F.2d at 25-26, affirmed, 102 S.Ct. at 2766-2772. This was precisely the grounds on which the Court of Appeals in the instant case distinguished Rendell-Baker:

> The plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state officials who were aware of, and approved of, certain of the practices

> which the district court has now enjoined.

(Petitioners' App. A., 17a.)

Blum v. Yaretsky presented a very different situation. This Court held that state officials could not be held liable for the actions of private nursing homes in transferring plaintiffs without notice or an opportunty for a hearing. The Court stated the crucial distinction between that case and the present appeal:

> This case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the state so as to make it "state" action for purposes of the Fourteenth Amendment.

102 S.Ct. at 2785. In Blum, this Court held that the relationship between the defendant state officials and the administrators of the nursing homes was simply too tenuous to ascribe liability to the state. Id. In the present case, of course, the petitioners are themselves the

owners and operators of the Provo Canyon facility; the only order appealed from is the injunction entered by the District Court prohibiting them from continuing the mail censorship, polygraph tests, isolation, and physical brutality. Both Rendell-Baker and Blum were fully briefed for the Court of Appeals. In its decision below, the Court of Appeals did not mention Blum because the case is simply not relevant to the instant appeal.

Petitioners attempt to bootstrap their argument against a finding of state action by spending 4-1/2 pages in their petition discussing their objections to the attorney's fees award in this case. This is clearly without merit. First, other than an objection to the inclusion of one of the three named defendants in the fees award, the petitioners failed to preserve this as an appellate issue before the Court of Appeals and have not included

the propriety of the fees as a question before this Court. Second, the amount of the fees award hardly supports the petitioners' contention that the finding of state action has led to an unjust result. As the District Court pointed out, the petitioners operated the facility as a major profit-making enterprise, with gross revenues in 1979 totaling $1,857,796.67, and direct or indirect benefits in 1978 to petitioners Williams and Crist (then the sole owners) in excess of $167,000.00 each (Petitioners' App. B., 37a). These profits were made possible by the substantial infusion of public monies and from the ongoing support and participation of state agencies.

2. The decision below is fully consistent with Youngberg v. Romeo, 1025 S.Ct. 2452 (1982), and the petition does not raise any other significant legal issues.

The petitioners have raised no serious argument that the legal standard

used in this case was incorrect. They hardly could, since the District Court scrupulously adhered to this Court's holding in Bell v. Wolfish, 441 U.S. 520 (1979) and did so at the urging of the petitioners themselves.

The petitioners' real objection is that they disagree with the factual conclusions of the District Court and of the Court of Appeals, and they would like one more review of the lengthy trial record. There is nothing in the record of this case which warrants this Court's exercising its discretionary power of certiorari.

Although the District Court rendered its decision prior to this Court's ruling in Youngberg, the District Court correctly foresaw the appropriate principles and, in fact, utilized an approach identical to that ultimately adopted in Youngberg. Relying upon Bell, the District Court held

that the Fourteenth Amendment, not the Eighth, was the applicable law in this case. The District Court also determined that

> conditions of confinement must be reasonably related to legitimate purposes of confinement or to legitimate security and administrative needs of the confining facility, and may not be unreasonably restrictive in light of those legitimate purposes and needs.

(Petitioners' App. B., 74a.) Further, the District Court rejected the notion that plaintiffs were entitled to receive treatment in the least restrictive alternative possible. (Petitioners' App. B., 72a-73a.)

In applying the appropriate legal standards, the District Court heard extensive testimony regarding the nature of the practices at the Provo Canyon facility. The court heard testimony from defendants' and plaintiffs' experts, from current and former residents of Provo Canyon, and from current and former

employees of the defendants. Many of plaintiffs' witnesses testified to the arbitrary practices at Provo Canyon which, as the Court of Appeals stated, "tended to paint a picture of undue punishment, if not outright brutality, in no wise related to the school's educational program." (Petitioners' App. A., 18a.)

Similarly, the District Court listened carefully to the testimony of parents of children at Provo Canyon. While some parents expressed knowledge and support for the practices at the institution, others testified as to their total shock and outrage when they discovered what the petitioners had done to their children. The court also heard lengthy testimony from the defendants themselves regarding the motivations for their practices and their purported experience and expertise.

In reviewing each of the challenged

practices, the District Court sought to keep

> its intrusion into the affairs of the Provo Canyon School to the minimum level necessary to insure the honoring by the school of those rights protected by the Constitution and state and federal special education laws.

(Petitioners' App. B., 78a.)

The District Court showed extreme deference to the decisions made by the defendants. It broadly construed the legitimate purposes and objectives of the Provo Canyon School (Petitioners' App. B., 74a). It upheld 9 of the 13 practices challenged in this case. (Petitioners' App. B., 75a.) It specifically refused to enjoin any practices solely because plaintiffs' experts considered them inappropriate. (Petitioners' App. B., 43a.)

The District Court was willing to intervene only after all the evidence, taken as a whole, along with the purported

rationales of the defendants, failed to establish any reasonable and legitimate basis justifying the defendants' practices. The Court of Appeals fully reviewed the District Court's decision and the record in this case after this Court's decision in Youngberg v. Romeo, asked for and received special briefing specifically on this point, and unanimously held that "the District Court's findings and conclusions on this matter ... are amply supported by the record." (Petitioners' App. A., 23a.)

Petitioners' alternative reliance on Parham v. J.R., 442 U.S. 584 (1979), is totally inapposite. As the District Court properly observed,

> Parham was not concerned with conditions of confinement; it was concerned with procedures by which confinement may occur.....However, Parham did hold that where confinement is to occur at a state facility, even the "voluntary" or private placement by parents was subject to procedural scrutiny under the Due Process Clause of the

Constitution.

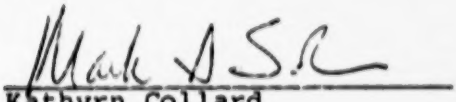
(Petitioners' App. B., 73a-74a.)

In this case the petitioners subjected children to four practices which the District Court found abusive and tantamount to "punishment" if inflicted on adult felons. For example, the District Court found that the petitioners used the polygraph at Provo Canyon as "an 'instrument of terror' rather than therapy." (Petitioners' App. B., 76a.) This decision fully comports with the principles established in Youngberg. The District Court carefully deferred to the judgment of the defendants and held them only to a standard of reasonableness. It diligently sought to minimize any undue interference with the operation of Provo Canyon. Only when the defendants' actions and practices were so outrageous and clearly punitive did the District Court intervene.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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